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NORTH CAROLINA REPORTS.

VOL. 7.

REPORTS OF CASES ARGUED AND
ADJUDGED

IN

THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1819.

BY A. D. MURPHEY,

LATE ONE OF THE JUDGES OF THE SUPERIOR COURTS OF LAW AND EQUITY.

(Vol. III.)

RALEIGH, N. C.:
REPRINTED BY EDWARDS & BROUGHTON.
1894.

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE YEAR 1819.

THE HON. JOHN LOUIS TAYLOR, CHIEF JUSTICE.
JOHN HALL, ESQ.
LEONARD HENDERSON, ESQ.

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CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JANUARY TERM, 1819.

(3) THE STATE *v.* JIM, a Negro Slave.

From Cumberland.

Indictment against A. for breaking a dwelling-house in the day-time, no person being therein, and feloniously taking therefrom a bank note of the value of five pounds, concludes against the *form of the statute:* A. cannot be convicted of a capital felony. Such indictment should conclude against the form of the *statutes.*

The statute of 1806, ch. 6, makes capital the offence of breaking a dwelling house in the day-time, and feloniously taking therefrom *money, goods, or chattels:* a bank note was not the subject of larceny before the statute of 1811, ch. 11.

The indictment charged "that Jim, a Negro slave, the property of Neill Shaw, late of the county of Cumberland, on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighteen, about the hour of one in the afternoon of the said day, the dwelling-house of one Gurdon Savage, then and there situate, then and there feloniously did break and enter, no person being therein, and one bank note therein being, of the value of five (4) pounds, issued by order of the President and Directors of the State Bank of North Carolina, &c. &c. of the monies, goods and chattels, of the said Gurdon Savage, then and there being found, then and there in the dwelling-house aforesaid, feloniously did steal, take, and carry away, contrary *to the form of the statute* in such case made and provided, and against the peace and dignity of the state." The Jury found a special verdict, affirming the guilt of the prisoner, provided the Court should be of opinion that he could be legally guilty of the felony charged in the indictment under the act of 1806, ch. 6; but if the Court should be of opinion that the prisoner could not be legally convicted of the felony under that act, and it was necessary that the indictment should conclude against the form of that act, and also against the form of the act of 1811, ch. 11, making bank notes a subject of larceny, then they found the prisoner not guilty.*

TAYLOR, Chief-Justice, delivered the opinion of the (5) Court:

The questions arising in this case are, 1st. Whether the breaking open of a dwelling-house in the day-time, no person being therein, and stealing therefrom a bank note, of the value of five pounds, be a capital felony within the act of 1806, ch. 6; and, 2dly, if it be not. Whether the indictment is defective in not concluding against the form of both statutes mentioned in the special verdict.—The words of the act of 1806 are, "If any person or persons shall break any dwelling-house, shop, warehouse, or other out-house thereto belonging or therewith used, in the day-time, and feloniously take away *Money*, *Goods* or *Chattels*, of the value of twenty shillings or upwards therein being, &c."—Whatever could not be the subject of larceny when the act of 1806 was passed, did not become the subject of a felonious taking under that act. A bank note was considered as having no intrinsic value, not importing any property in possession of the person from whom it is taken. Although the words used in the act

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*The act of 1806, ch. 6, declares, "if any person or persons shall break any dwelling-house, shop, warehouse or other out-house thereto belonging, or therewith used, in the day-time, and feloniously take away any *money*, *goods* or *chattels*, of the value of twenty shillings or upwards, therein being, although no person shall be within such dwelling-house, shop, warehouse or other out-house, or shall comfort, aid, abet, assist, counsel, hire or command any person or persons to commit such offence, and being thereof lawfully convicted, or being indicted shall stand mute, or peremptorily challenge more than thirty-five jurors, shall suffer death without benefit of clergy."

And the act of 1811, ch. 11, declares, "that if any person or persons shall feloniously steal, take and carry away, or take by robbery, any Bank note, Check, or Order for the payment of Money, issued by, or drawn on any Bank, or other Society or Corporation within this State, or within any of the United States; or any Treasury Warrant, Debenture, Certificate of Stock, or other public security: or any Order, Bill of Exchange, Bond, Promissory Note or other obligation, either for the payment of money or the delivery of specific articles, being the property of any other person or persons or of any Corporation, (notwithstanding any of the said particulars may be termed in law choses in action) such felonious stealing, taking and carrying away, or taking by robbery, shall be deemed and construed to be felony of the same nature and in the same degree, and with or without benefit of clergy, in the same manner as it would have been, if the offender or offenders had feloniously stolen, or taken by robbery, Money, Goods or Property of like value with the Money, or specific articles due or expressed on the face of such Bank Note, Check, Order, &c."

might have a more comprehensive meaning in a testament, in favor of intention, yet in a penal law they cannot be construed to embrace bank notes. As the felony, therefore, described in the act, is incomplete without the actual stealing of what the law deems *Money*, *Goods* or *Chattels*, the conviction under that act alone cannot be supported.

But the act of 1811, makes bank notes, subjects of larceny, and from both acts taken together, the guilt of the prisoner can only be inferred. Every indictment is presumed to be founded on the common law, unless some statute is indicated by the drawer of the bill, on which he means to prosecute. Nor can this be considered an unmeaning form, or useless refinement; for the accused might often be thrown
(6) off his guard, by supposing that he was to be prosecuted at common law, if afterwards he were proceeded against by statute; or by being referred to one statute, and afterwards tried upon another, or upon both together. To observe the law in this particular, is in effect to comply with the declaration of the Bill of Rights, by apprising every man, who is criminally prosecuted, of the specific charges against him. It is accordingly an established principle, that if a statute create an offence, or alter the nature of an offence at common law, as by turning a misdemeanor into a felony, the indictment must conclude against the form of the statute. (2 Hale's Hist. 192). And if an offence is made so, not by one statute only, but by two or more taken together, the reason is equally strong, that the accused should be referred to more than one statute in the indictment. In an information for not coming to church by such a time, "against the form of the statute," and there being three statutes in this case, to-wit, 1 Eliz. ch. 2. 23 Eliz. ch. 1. And 29 Eliz. ch. 6. And it not appearing which, it was adjudged ill. (Cro. Jac. 142).

The Defendant is, by this indictment, referred to one statute: which shall he examine to prepare his defence? If he look into the act of 1806, he discovers that he cannot be convicted under it? for he has not taken any thing which was then the subject of larceny. If he look into that of 1811, he finds he may be convicted of a clergiable felony, by stealing a bank note, but not of a capital one, by breaking a dwelling-house and stealing it therefrom. Whilst he is preparing his defence under one law, the prosecutor is arranging the charge under another; and by the perplexity thus occasioned, an innocent man may be surprised into a conviction.

(7) THE STATE *v.* CHERRY, a Negro Slave.

From Wayne.

Under the act of 1811, ch. 6, an indictment for murder may be "intelligible and explicit," and contain sufficient to induce the "Court to proceed to judgment," if the *time and place of making the assault*, be set forth, although they be not repeated as to the *mortal blow*.

The indictment charged "that Abraham, a negro slave the property of John Howell, late of the county of Wayne, and State of North Carolina, not having the fear of God before his eyes, but being moved and seduced by the instigations of the Devil, on the fourth day of November, in the year of our Lord one thousand eight hundred and seventeen, with force and arms, in the county of Wayne, and state aforesaid, in and upon Andrew Scott, in the peace of God, and the state, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Abraham with a certain axe of the value of ten pence, current money of the state aforesaid, which axe the said Abraham in both his hands then and there had and held, in and upon the said Andrew Scott, on the right side of the head, near the right temple of said Andrew Scott, feloniously, wilfully, and of his malice aforethought, did strike and beat, giving to the said Andrew Scott, by the striking and beating aforesaid, with the axe aforesaid, in and upon the right side of the head, near the right temple of him the said Andrew Scott, one mortal wound, of the depth of two inches, and breadth of ten inches; of which said mortal wound the said Andrew Scott then and there instantly died: &c. &c. And that negro slaves Ben and Cherry, the reputed property of said Andrew Scott, were then and there each of them present, and did then and there feloniously, wickedly, and with malice aforethought, aid and abet the said Abraham in feloniously assaulting and striking the said Andrew (8) Scott as aforesaid: &c. &c. And that the negro slaves Abraham, Ben and Cherry, feloniously, wilfully and of their malice aforethought, him the said Andrew Scott did kill and murder, against the peace and dignity of the State."

The prisoner was convicted, and a motion was made by Mordecai, to arrest the judgment, for that the *time and place* of giving the *mortal blow*, were not set forth in the indictment; and the motion being referred to this Court.

TAYLOR, Chief-Justice, delivered the opinion of the Court: An indictment ought to contain a description of the offence, which the prisoner is called upon to answer, expressed with plainness, brevity and perspicuity, and accompanied with those essential circumstances which concur to ascertain the fact and its nature. In the statement of these and of their specification, great strictness has always been required in favor of life; to a degree, indeed. that in the opinion of Sir Mathew Hale, it had become the disease and reproach of the law. I cannot think it possible that any man can read this indictment, without receiving from it the impression, that the assault, the holding of the axe in both hands, and giving the mortal blow, were all parts of one and the same transaction, and that the last mentioned act followed immediately. The assault is stated to have been on the 4th November, and that "*then and there*" the negro slave Abraham held the axe in his hands, with which he struck the blow: but the "*then and there*" are not repeated as to the blow itself. If a person were asked, upon reading the indictment, when and where the blow was given, he would assuredly answer, *in the County of Wayne, and on the fourth day of November.*

The circumstances of place and time are however particularly required by the common law to be annexed to the very fact of striking, not by intendment or construction, but by express words; in order that the offence may appear (9) to the Court to have been done within their jurisdiction, and that the death should appear to have taken place within a year and a day, computing from the time the blow was given: and another reason as to the time, was, that the forfeiture of the land related to the day of giving the blow. That this was so, appears from Cotton's case, (Cro. Eliz. 739), which is expressly in point, and from which there has been no departure in any modern decision that I can find. By this case and the series of decisions to the same effect, to be found in Hale and Hawkins, I should feel myself conclusively bound, without being at liberty to scrutinize the reasons of them, were it not for our act of 1811, ch. 6, which provides that it shall be sufficient to all intents and purposes, that the indictment shall contain the charge against the criminal, expressed in a plain, intelligible and explicit manner, and that no bill of indictment shall be quashed or judgment arrested, for or by reason of any informalities or refinements, when there appears to the Court sufficient in the face of the indictment, to induce them to proceed to judgment. If this act of Assembly is not always to sleep in the Statute Book, it never can be called into operation more fitly than in the present case; for undoubtedly, the charge is set forth in a plain, intelligible and explicit manner. The propriety of resorting to this act in the present case is more evident, when it is seen in the books, that the exception now taken has been yielded to only "in favor of life," and that it would not prevail in an indictment for a misdemeanor. This proves, if proof were necessary, that an indictment may be *intelligible* and *explicit,* and contain sufficient to induce the Court to proceed to judgment, without the time and place being repeated as to the blow, if they had already been connected with the assault.

I wish not to be understood as expressing an opinion that the act cures any radical defects in an indictment, (10) or that the time and place, *when and where,* the fact was committed, are not an essential part of it; but I think they do appear by a rational and obvious construction of this indictment; and as it is only by a subtle and refined course of argumentation that the objection can be made perceptible to the mind, it is of that character which the act intended to cure—Let the reasons in arrest of judgment be overruled.

THE STATE *v.* ISAAC DICKENSON.

From Edgecombe.

A. being recognized in 800*l.* to appear, failed, and his recognizance was forfeited. Scire Facias issued against him to shew cause, "why execution should not issue for 800*l.* for a *fine* on a forfeited recognizance, in failing to appear, &c—Defendant pleaded "*nul tiel record;*" plea negatived and judgment for the State.

The defendant was recognized in the sum of eight hundred pounds to appear, at the Superior Court of Law for Edgecombe County; and failing to appear, his recognizance was forfeited, and judgment *nisi* was entered against him. A *scire facias* was sued out, directed to the Sheriff of Wayne, commanding him "to make known to the defendant that he be and appear, &c. to shew cause why execution should not issue against him for the sum of eight hundred pounds *for a fine* on a forfeited recognizance in failing to make his personal appearance at March Term, &c. as he was bound to do." To this *scire facias,* the defendant pleaded *nul tiel record.* And it was submitted to this Court, whether the record supports the *scire facias.*

TAYLOR, Chief-Justice, delivered the opinion of the Court: The word *fine* might well be left out, if it obscured or confounded the sense of the *scire facias;* and it would then read "eight hundred pounds on a forfeited recognizance". (11) But if the word be retained, it is not possible for the defendant to misapprehend the purport of the *scire facias*, because the meaning intended to be affixed to the word, is explained by what follows. When the state exhibits the record shewing that the defendant's recognizance was forfeited, the fact affirmed in the *scire facias* is substantially proved, and the plea of *nul tiel record*, negatived—Let judgment be entered for the State.

(12) THE STATE *v.* BARNA JERNIGAN.

From Wayne.

The act of 1779, ch. 11, declares, "that any person or persons, who shall hereafter steal, or shall by violence, seduction or any other means, take or carry away any slave or slaves, the property of another, *with an intent to sell or dispose of to another, or appropriate to their own use*, such slave or slaves, &c. shall suffer death without benefit of clergy."—The indictment charged that *A.* did *steal, take* and *carry away* a male slave named Amos, of the value of fifty shillings, and the property of one *B. contrary to the act of the General Assembly in such case made and provided.* Although the stealing is not described as having been accompanied with either of the intentions, to-wit: to appropriate to his own use, or sell or dispose of to another, the benefit of clergy is taken away by a conviction on the indictment.

The design of the act is two-fold: 1st. to punish the crime of stealing a slave with death, by taking away the benefit of clergy, to which the offender was entitled at common law. 2d. to punish in the same way all other wrongful means of depriving an owner of his slave, whether by force or fraud, if the act were accompanied with an intention to sell the slave or to appropriate him to the taker's use.

Where a Statute employs terms of art or technical terms, they must be taken according to the acceptation of the learned in each art, trade or science, the word *stealing* imports *a felonious taking and carrying away the personal goods of another.* But the taking by violence or seduction the slave of another, will be felonious or not, as it shall be done with or without an intention of selling or disposing of said slave to another or appropriating him to the taker's use.

The words of the Statute, "with intent to sell or dispose of to another, or to appropriate to his own use," relate to "the taking by violence, seduction or any other means."

The true meaning of the maxim, "*proximo antecedenti fiat relatio nisi impediatur sententia*" is, that reference shall be made to the next antecedent or not, accordingly as the sense, and reason and justice of the thing require it.

The indictment contained three counts. In the first count, it charged "that Barna Jernigan, late of the County of Wayne

and State of North-Carolina, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixteen, at and in the County of Wayne aforesaid, with force
(13) and arms, a certain male slave named Amos, of the value of fifty shillings, and the property of one John Coor Pender, of the County of Wayne, feloniously did *steal, take* and *carry away*, contrary to the act of the General Assembly in such case made and provided, and against the peace and dignity of the State."

In the second count, the indictment charged, "that the said Barna Jernigan, on the day and year aforesaid, and at the County aforesaid, one other male slave named Amos, of the value of fifty shillings, and the property of one John Coor Pender, of the said County, feloniously *did seduce, take* and *carry away*, with an intention the said slave Amos to appropriate to his own use, contrary to the act of the General Assembly in such case made and provided, entitled 'An act to prevent the stealing of slaves, or by violence, seduction or any other means, taking or carrying away any slave or slaves, the property of another, and for other purposes therein mentioned,' and against the peace and dignity of the State."

In the third count, the indictment charged, "that the said Barna Jernigan, on the day and year aforesaid, and at the County aforesaid, one other male slave named Amos, of the value of fifty shillings, and the property of one John Coor Pender, of the said County, feloniously did seduce, take and carry away, with an intention the said slave Amos to sell and dispose of, contrary to the act of the General Assembly in such case made and provided, entitled 'an act, &c.' and against the peace and dignity of the State."

The prisoner was found guilty; and it being asked why sentence of death should not be pronounced against him, Gaston, Stanly and Mordecai shewed for cause, that upon the first count in the indictment, the prisoner was entitled to the benefit of clergy; for that the offence set forth in that count is not specified in the particular words of the Statute,
(14) and is to be considered a larceny at common law: and that the second and third counts do not specify the offence in the particular words of the statute, and that the offence charged in the said counts, is not indictable at common law, and therefore no judgment can be pronounced

against the prisoner upon these counts. And the prisoner having appealed from the decision of the Court below upon these reasons.

TAYLOR, Chief-Justice, delivered the opinion of this Court: The prisoner has been tried and convicted of an offence described in an act of the General Assembly passed in the year 1779, entitled "An act to prevent the stealing of slaves, or by violence, seduction or any other means, taking or conveying away slaves the property of another, and for other purposes therein mentioned." The words of the second section under which the offence arises, are, "that any person or persons who shall hereafter steal, or shall by violence, seduction or any other means, take or carry away any slave or slaves the property of another, with an intent to sell or dispose of to another, or appropriate to his own use, such slave or slaves, &c." going on to describe another crime, and concluding with annexing the punishment of death to the several offences so specified.

The indictment contains three counts. The first, charges the prisoner with stealing the slave Amos, the property of John Coor Pender, and concludes against the form of the Statute—The second charges that the prisoner did seduce, take and carry away the slave, with an intention to appropriate him to his own use—The third count differs from the second, by charging the intention of the prisoner to have been, to sell and dispose of the slave. These counts also conclude against the form of the Statute.

It has been contended by the prisoner's counsel, that the benefit of clergy is not taken away by a conviction (15) on the first count, because the stealing is not described as having been accompanied with either of those intentions, to-wit, to appropriate to his own use, or to sell or dispose of to another, which the Legislature has thought fit to connect with the crime; and, further, that the act being highly penal, ought to receive a strict construction, and on the side of lenity. On the two last counts it is alleged, that the indictment has departed from the words of the statute, in using the verb "did steal," instead of the substantive "seduction;" in charging that the prisoner "did seduce and take away," instead of charging that "he took the slave away by seduction."

The several objections and arguments offered on behalf of the prisoner, have been deliberated upon under a full sense of the awful consequences of our decision, and with all the care and attention which were justly due to the ability with which they were urged. But as in a general finding, judgment may be awarded, if any one count in the indictment be good, we shall forbear to give any opinion upon the two last counts, believing that the crime is properly described in the first, according to the words of the statute and its obvious meaning.

It has been argued, that whenever a statute renders an act, which was criminal at common law, more penal when done under particular circumstances, the indictment must specify the offence as it is described in the statute, otherwise only the common law judgment can be awarded by the Court. Numerous authorities prove the soundness of this position, and its inviolate observance is of vital importance to the security of the citizen. But it is not perceived, that the offence of stealing a slave, is described in the statute, by any circumstances or characteristics not appertaining to it at common law. The design of the act, as it is to be collected from the words, is two-fold, 1st, to punish the crime of stealing a slave with death, by taking away the benefit of clergy, to which the offender was entitled at common law; 2dly, to punish all other wrongful means of depriving an (16) owner of his slave, whether by force or fraud, if the act were accompanied with an intention to sell the slave, or to appropriate him to the taker's use. Under the several descriptions in the last head, acts might have been committed before the statute, certainly not amounting to felony; in some cases forming only a trespass, and in others, a trespass which could only be redressed by a civil action. This kind of property was, however, exposed in a peculiar manner to the artifice and depredations of dishonest men; besides violence, to which it was liable, in common with other chattels, a slave, being a moral agent, might be addressed through the medium of his hopes and his fears, his passions and affections, and thus seduced or driven from the service of his owner, into that of the spoiler. It is evident, therefore, that additional legal sanctions became necessary to guard a property thus assailable; more especially, as the loss to the owner was as great as if he had been deprived of it in a felonious manner, and there was not less moral turpitude in the offender. Nor would many persons expose themselves to a prosecution for felony, clergiable as it was, when they could accomplish their dishonest purposes by means which were not even the subject of a criminal prosecution.

In this state of things the Legislature interposed, and what they meant to do, is clearly explained in the preamble of the act. "Whereas it is necessary that the pernicious practice of stealing, or otherwise carrying away slaves, the property of others, &c" They then proceed to specify the crimes and ascertain the punishment; in doing which, they place the other offences in the same grade of criminality with stealing, provided they partake of that indispensible ingredient of stealing, *an intention to appropriate to the taker's use, or to sell or dispose of to another.* When a statute employs terms of art, or technical terms, they must be taken according to the acceptation of the learned in each art, trade, or science. Were a Divine called upon to expound the eighth commandment, he might, with great propriety, explain stealing to (17) signify any act of wrong, oppression or injustice, affecting the property of another. But where a Lawyer defines it as the subject of municipal punishment, he is allowed only to call it, "the felonious taking and carrying away the personal goods of another," and that the sense of *felonious* is "*Causa Lucri*." It is difficult to conceive, therefore, that the Legislature, enacting a law to be executed by the courts of justice, should have undertaken to describe by a wordy circumlocution, an offence familiarly known in the law for ages, by the use of a single word. The other offences described in the statute were not so known; nor would it have been just or wise to punish them with the severity of capital crimes, if they were unaccompanied with that essential quality of stealing, the *Causa Lucri:* because the property might have been taken by both means, *without* such intention, or even *with* the intention of restoring it after a time to the owner. To them, therefore, it relates, and to them alone; to the end that they might be punishable in the same manner with stealing. While this appears to be the rational construction of the law, it is not perceived to offer any violence to the grammatical one. The substantives "slave or slaves, the property of another," are governed equally by all the verbs, "steal, take, or carry away;" and though the sentence containing the two last verbs is divided from that containing the verb "steal" by the conjunction "or," yet it is by the same means connected in sense; so that "slave or slaves the property of another," are the objective case to all

the verbs. In the language of grammarians, "person or persons" form the agent, "steal, take, or carry away" the attribute, and "slave or slaves the property of another," the object. This furnishes a subject for the word "steal" to operate upon; and hence the objection is obviated, that the act would make it a capital felony to steal anything. Still it is said, that the intention expressed in the act must be coupled with all the verbs, if the latter govern the words "slave or slaves." Reasons have been given to shew
(18) that such a construction is inadmissible upon ordinary principles; and it may be shewn that it is inconsistent with the established rules of legal interpretation.

The rule of grammar that words shall be referred to the next antecedent, has been adopted and enforced in the law from an early period, and has had a direct influence upon the decision of many cases. But much to the credit of the Sages of the Law, it has uniformly been received and practised upon, with its proper limit and qualification, so as to fulfil the intention of the Legislature in civil matters, to ascertain the design of parties in private contracts, and to furnish a rational exposition of every instrument, public and private, that called for the judgment of a court. As a rule of legal construction, it stands thus, *Proximo antecedenti fiat relatio, nisi impediatur sententia;* and in the various cases in which it has been introduced, it has been rendered instrumental towards affecting a right understanding of the subject, and rendering substantial justice. A man agrees to abide the award of J. S. who awards that he shall pay before such a feast ten pounds to another, and that *then* the other shall make him a release. The word *then* shall not be referred to the feast, but to the time of payment of the money. (Dyer 15, b.) The statute 32 Henry VIII. ordains that none shall buy right or titles in land, unless such persons have been in possession of it, or of the reversion or remainder of it, or have taken the rents and profits of it, for the space of one whole year next before. Here these words "by the space of one whole year," shall be referred only to the sentence next before, viz. to the taking the rents and profits. (Plowd. 107.) A case in Holt's Rep. 449, is shortly this. A mandamus was issued to restore *John Freebody* to the place of Burgess of a town, from which he had been ejected by the corporation. Part of the return on the mandamus was, that at such a time one Sir *John B.* was Mayor, and that he assembled the rest of the Burgesses, and that the said *John* being summoned, &c. the said *John Freebody* was removed by the said (19) Mayor and Burgesses. The counsel for the Corporation objected that the return was not good, for that it is, "the said *John* being summoned, &c. the said *John Freebody* was removed," and the word "said" refers "*Proximo antecedenti;*" and that is *John* the Mayor; so that *John Freebody* was not summoned. But the Court held it well enough; for "said" shall refer to the next antecedent, if it does not break the sense, as here it would do.

From all the cases on this subject, the principle to be extracted is, that reference shall be made to the next antecedent, or not, accordingly as the sense and reason and justice of the thing require it. And this is the conclusion at which we had before arrived without the aid of decided cases.

The very question, however, before us, has been decided in the case of the *State* v. *Hall*, (Haywood) by a Judge, whose opinions on every subject, but particularly on this, merit the highest respect. Judge Moore was appointed Attorney-General, a short time after this act of Assembly was passed, and discharged for a series of years the arduous duties of that office in a manner that commanded the admiration and gratitude of his cotemporaries. His profound knowledge of the criminal law was kept in continual exercise by a most varied and extensive practice, at a period when the passions of men had not yet subsided from the ferment of a civil war; and every grade of crime, incident to an unsettled society, made continual demand upon his acuteness. No one ever doubted his learning and penetration, or that while he enforced the law with an enlightened vigilance and untiring zeal, his energy was seasoned with humanity, leaving the innocent nothing to fear, and the guilty but little to hope. The opinion of such a man, delivered on an occasion the most solemn in which a Judge could act, where a doubt in him would have been life to the prisoner, assumes the authority of a cotemporary exposition of the statute.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

MAY TERM, 1819.

ARCHIBALD M'KAY, Guardian, &c. *v.* WILLIAM HENDON.

From Bladen.

A. by his will, directed certain negro slaves to be divided between his three children, William, Mary and Sarah, when either of them should come of age, or sooner, if the executors found it necessary; and then declared, "that if either of the said children should die under age, without heirs, then that share should be divided between the other two children." Mary died under age and without issue. William then died, leaving Sarah of the whole blood, and two brothers and a sister of the half blood, of the maternal side. The part or Mary's share which accrued to William upon her death, does not survive to Sarah, but goes to her and to the brothers and sisters of the half blood.

The rule is, that where legacies are given to three or more persons as tenants in common, with a bequest to the survivors upon the death of any of them within a given period, the original legacies only, and not the shares which accrued by survivorship, will survive.

The only exception to the rule is, where the fund is left as an aggregate one, and made divisible among many persons as legatees, with benefit of survivorship among them.

The question upon this case arose upon the following clause in the will of Richard Salter. "I give my other negroes, young Cato, Peter, Dinah, Mary, Anne, and Diana, to be divided between my three children, William, Mary and Sarah, to them, their heirs and assigns forever, to be divided when either of them comes of age, or sooner if my executors should find it necessary: and my will is, that if either of my said children should die under age, without heirs, then that share to be divided between the other two children." The testator left his wife Nancy and three children, William, Mary and Sarah, him surviving. Nancy, the widow, intermarried with Archibald M'Kay, by whom she had issue, Alexander, John and Eliza. Mary, one of the children of Richard Salter, then died, a minor and without issue. Afterwards, William, another child of the said Richard Salter, died, a minor and without issue. The petitioners, Alexander, John and Eliza M'Kay, children of Nancy by her second husband, Archibald M'Kay, filed this petition by their father, who had been appointed their guardian, against the representative of Richard Salter, for an account and distribution of the legacies given to Mary and William Salter; and a question was made, Whether the petitioners were entitled to any part of the estate which vested in William Salter, either under the will of his father, or by the death of his sister Mary? And if so, to what part?—And the case having been sent to this Court for the opinion of the Judges,

TAYLOR, Chief-Justice, delivered the opinion of the Court: The brothers and sister of the half blood of the maternal side to William Salter, who died intestate, have filed this petition by their guardian, to obtain an account and distribution of that part of the intestate's personal estate, which he acquired under the will of his father, Richard Salter. The three children of the testator survived him, and afterwards, Mary died under age and without issue, leaving of the whole blood, her brother William and her sister Sarah; and of the half blood, Alexander and John, her brothers, and Eliza her sister, surviving: Then William died (23) under age, and without issue, leaving the preceding brothers and sisters surviving.

It may be conjectured, that the testator meant to confine his bounty to his three children and their descendants, if they should have any: And that upon the death of two under age and without children, the whole of the negroes should belong to the surviving brother and sister: That while any one of his children was alive, no other collateral relation of those who were dead should share with the survivor; and least of all, could the testator contemplate that the children of his widow by a future husband should be entitled to share with the surviving child. If a Court were at liberty to judge of the testator's intention, deduced from circumstances out of the will, and by giving to words in the will a construction in opposition to that which has been affixed to them by a series of decided cases, the considerations which have been mentioned, might probably in this, as well as in other instances, meet the justice of the case: but then it would put an end to the certainty of the law and the security of property. For while Judges may find out by industry the rules of interpretation established by law, their speculations, as to the intent of the testator, may differ; no legal opinion could be given on a will, by which so much litigation is now prevented; and it would be impossible to pronounce who was the owner of property claimed under a will, until the decision of this Court could be had on the question. A state of things so pregnant with mischief ought to be carefully avoided by a Court established for the purpose of testing by legal principles the adjudications of other tribunals: Yet it would be difficult to state a case, in which a decision for one party would be in resistance to a stronger current of authorities than would be a decision for the defendant in this case.

The rule is, that where legacies are given to three or more persons as tenants in common, with a bequest to the survivors upon the death of any of them within a given period, the original legacies only, and not those shares which (24) accrued by survivorship, will survive; because such accrued shares, vesting in the surviving legatees in distinct proportions, proper words are necessary to make these shares survive with the others. This had been decided in relation to real property in Woodward *vs.* Glascock, (2 Vern. 388), and in chattels, in Rutge *vs.* Bunker, (Forrester 124), and Perkins *vs.* Micklethwaite, (1 P. Wms. 274). The reason of these determinations is, that the share accruing by survivorship vests in the surviving children by distinct shares, and not in them as joint tenants. In the case before us, the surviving share is directed to be divided between the other two children; and in Rutge *vs.* Bunker, the Master of the Rolls says, "share and share alike" are equivalent to the words "equally to be divided." In the case *ex parte* West, (1 Bro. c. c. 575), before Lord Thurlow, the words of the will were "I leave to A. B. C. sons of Arthur Scaife 1000*l.* each, the interest to be added to the principal yearly, until they shall respectively attain the age of twenty-one years: and in case any of them shall die before that age, then to the survivors." A. died, and then B. both under the age of twenty-one. The question was, whether that part of the share of A. which survived to B. upon the death of A. survived afterwards to C. upon the death of B? Or whether B's original share only survived? The Judge thought it a natural construction, that the word "share" in the case cited, Rutge *vs.* Bunker, would take in the survived part as well as the original share; and consequently, the whole ought to survive: but he could not so decide without contradicting cases expressly in point; and, not being able to distinguish the case before him, he decreed that the survived part did not survive: expressing, at the same time, a wish to reconsider his opinion. In consequence of what fell from him, the same case was afterwards brought on before the Master of the Rolls, Lord Kenyon, whose decree corresponded with the (25) former ones. From a belief that an adherence to the rule generally disappointed the intention of testators, one case which, at first view, would seem to come within it, has been excepted from it, by reason of the peculiar penning of the will; but Lord Hardwicke, who made the decision, recognized the rule itself in the fullest manner—The material words of the will were, "I give the residue of my personal estate to my brother and sisters, Charles, Mary and Elizabeth, and the sisters of my late wife, Martha and Rebecca Paine, to be equally divided among them, share and share alike; and in case of the death of my brother or any of my sisters, or wife's sisters, before me, or the survivor of my father and mother, I do appoint *his*, *her* or *their* shares to be divided among the survivors of them." Charles died in the testator's life time, but after the making of the will: Mary and Elizabeth, the testator's sisters, died in the life-time of the testator's mother, who survived her husband, but was then dead—The bill was brought by Martha and Rebecca Paine for the residue of the estate—It was decided that the accumulated shares of the persons who were dead, survived as well as the original ones; and the course of reasoning employed was, that there was an express direction that if any should die before the testator, his or her share should survive to the others; and the share of the one dying before the testator, would not have survived at all, but for this clause; it would have been an undisposed part of the testator's estate—Then if another had died in the testator's life time, the original fifth of him who died second, as well as the share which survived to him on the death of the first, would have gone over likewise—Therefore the testator meant that the accumulated as well as the original share should survive, and a different construction cannot be put on the word share in one case than in the other (Paine *v.* Benson, 3 Atk. 78). It must be acknowledged that the reasoning in Paine *v.* Ben- (26) son went very close to the wind to steer clear of a rule that was thought to militate against the testator's intention; but admitting the case to be well decided, (which was subsequently doubted by Lord Thurlow in the case of West, *ex parte*) yet it is not an authority for the Defendant in the case before us, in which the foundation is wanting on which the Chancellor built the whole of his reasoning. For if either of the children had died before the testator, the share given to him or her would have lapsed; and the case cited turned upon the necessity of giving to the word "share," the same meaning when applied to the accumulated share, which it had when applied to the original one.

The only distinct exception to the rule is, where the fund is left as an aggregate one, and made divisible among many persons as legatees, with benefit of survivorship among them. (Worlidge *v.* Churchill, 3 Bro. C. C. 465.) The Judge, in giving his opinion, relies upon *Rutge* v. *Bunker* to shew that the rule was not thought to apply to an aggregate fund; and deduces from the will, proofs from particular expressions, that the testator meant to keep it as an aggregate fund. Having examined all the cases relative to this question, with attention, we are bound to decide that the petitioners are entitled to divide with the defendants that share which William acquired by the death of Mary.

(27)

ROBERT EDENS and Wife and others *v.* JAMES WILLIAMS'S Executor.

From Bertie.

A. being seised of a tract of land, and possessed of five slaves, made his will, and therein lent to his wife, during her life, his land and three of his slaves, with his household furniture and stock. He then directed that if his wife should be *ensient* with child, such child should be raised and educated by his wife, out of the income of the property left to her, *as well as all the property he died possessed of.* He then bequeathed to his brother's two daughters, his other two slaves, to be divided between them when either of them should marry; the wife was *ensient* with child; and one of the brother's daughters having married, the Executor was called upon to divide the two slaves and their increase between her and her sister.

Held, that upon the construction of the whole will, the brother's daughters were not to take, if the wife should prove to be ensient with child; and that all the property belonged to the child after the mother's death.

In construing the will, the Court will look to the state of the testator's family, and to the kind and extent of property he owned at the time of making his will.

Robert Edens and Sarah his wife, and Elizabeth Williams, an infant, by her guardian, filed their bill of complaint in the Court of Equity for Bertie County, against Jehu Nichols, executor of the last will of James Williams, late of Bertie County, and therein charged that the said James Williams, in his last will, which had been duly proved since his death, and of which the defendant had been appointed and had qualified as executor, had bequeathed as follows, to wit, "I give and bequeath unto my brother's two daughters, Sarah and Eliza Williams, one negro woman named Esther and her child Harry, to be in the care and under the direction of my brother William Williams until either of them marrieth; at which time it is my will and desire, that the said Esther and Harry, and the increase of Esther, if any, to be equally divided between them. Item—I lend unto my brother William Williams, my silver watch during (28) his life, and after his death, I give the said watch to his daughter Sarah Williams, to her and her heirs and assigns for ever." That the defendant took into his possession the property mentioned in the said bequests; that complainants Sarah and Elizabeth were the nieces of the testator mentioned in the will; that Sarah had intermarried with Robert Edens; that William Williams, the brother of the testator and father of the complainants Sarah and Elizabeth, had died; and he being dead and Sarah having married, the bill charged that complainants were entitled to demand from the defendant, the silver watch and the negro slaves, mentioned in the aforesaid bequests; that they had applied to the defendant for this purpose, and he had refused to deliver either the watch or negro slaves, the bill prayed that the defendant might be decreed to deliver to the complainants the watch and the negro slaves, and account for the hire of the slaves, &c.

To this bill, the executor, Jehu Nichols, put in his answer, and therein admitted the several allegations of the bill; but alleged that he was advised Complainants were not entitled to the watch and negro slaves; for that the testator left his wife *ensient* with child, which was born a few months after his death, and was still alive; that the testator had made his will with reference to such an event; and that, upon the construction of the whole will, he was advised Complainants were not entitled, except in the event that the testator's wife had not been *ensient* with child at the time of his death: and he prayed the advice of the Court.

The several clauses of the will referred to by Defendant, in his answer, are in the following words:

"I lend unto my dear and loving wife, Susannah Williams, my plantation, and buildings thereunto belonging whereon I now live, during her natural life; also lend her, my said wife, all my household and kitchen furniture, except two beds and bedsteads, to be sold by my executors; also one negro man named Jack, one boy named Daniel, and (29) one negro woman named Jenny, and one sorrel mare named Lucilda, and all my stock of cattle and hogs, during her natural life, subject only to the provisions hereafter mentioned.

"Item—Provided my said wife Susannah Williams should be now pregnant of one or more children, it is my will and desire such child or children shall be raised and educated by my said wife out of the income of the property left to her, as well as all the property I die possessed of: but if such child or children should marry, or arrive to the age of maturity, in my said wife's life-time, the one so marrying shall have an equal share of all my negroes and increase, as well as all my other property, except the lands and buildings left to my said wife. But, in case the child or children my wife is suggested to be pregnant with should die before marrying or arriving to the age of maturity, my wife Susannah Williams shall have the property in manner as above left to her during her natural life.

"Item—It is my will and desire that all my property left to my wife, or all she shall inherit from my estate, after her death shall be inherited by my child or children, or for want of such heirs, as hereafter mentioned.

"Item—I give and bequeath to my niece Sarah Williams, my land and improvements thereon, after my wife's death. I also give all the residue of my estate left to my wife her life-time, to be equally divided between my brother's two daughters, Sarah and Eliza Williams, to them, their heirs and assigns forever.

"Item—I give and bequeath unto my brother's two daughters, Sarah and Eliza Williams, one negro woman, named Esther, and her child Harry, to be in the care and under the direction of my brother William Williams, until either of them marrieth; at which time it is my will and desire that the said Esther and Harry, and the increase of Esther (if any) to be equally divided between them.

"Item—I lend unto my brother William Williams (30) my silver watch during his life, and after his death

I give the said watch to his daughter, Sarah Williams, to her, and her heirs and assigns forever.

"It is likewise my desire, should I not leave money sufficient to discharge all my debts, in that case my executors should sell as much of my moveable estate, which my wife can best spare, as will make up the residue."

BY THE COURT—Some aid in discovering the intention of the testator may be derived from a consideration of the state of his family, and the kind and extent of the property he owned at the time of making his will. (1, P. Wms. 286.—4 Bro. R. 441.) His family consisted of his wife only; and it cannot be presumed that he had any other property than that specified in his will, which consisted only of his plantation, household furniture, stock and wearing apparel, together with five slaves. Indeed it is almost certain that this constituted the whole of his estate; because he directs that in the event of his not leaving money enough to pay his debts, such part of his personal estate should be sold for that purpose as his wife could best spare.

A man so situate would naturally desire to make a competent provision for his wife during her life, and to bestow some present token of his regard upon those who were nearest to him in blood, with the prospect of an accession to it upon the death of his wife. But if he thought it probable that his wife was then *ensient*, the natural affection of a parent would prompt him to make a provision for his future offspring; and, from a fortune so small, would as naturally restrain him from making a deduction in favor of his collateral kindred. If this intention can be fairly collected from the will, it is our duty to give effect to it, though it may not be expressed in legal and technical words.

(31) In the first clause of his will, the testator lends to his wife during her life, his plantation, furniture, stock, and three out of five of his slaves; and the second clause provides, that if she should then be pregnant with one or more children, such child or children shall be raised and educated by his wife, out of the income of the property left to her, *as well as all other property he dies possessed of:* if the child or children should marry or arrive at age in his wife's life-time, the one so marrying shall have an equal share of all his negroes and their increase, as well as all his other property, except the land left to his wife. In the event of the child or children dying before marriage or arrival at

age, then the property devolves upon the wife as directed in the first clause. The third clause directs that all the property left to his wife, as well as all she should inherit from his estate, after her death shall be inherited by his child or children, or for want of such heirs, as hereafter mentioned. By the fourth clause, he gives the land left to his wife, to his niece, Sarah Williams, after the death of his wife: And the residue of what he had given to his wife, he directs to be equally divided between his brother's two daughters. Then follow the fifth and sixth clauses under which the complainants claim the slaves, Esther and Harry, and the silver watch. If we apply to the will the ordinary rules of construction, it is plain that the intent of the testator was to confine his bounty to his wife and children, if she should have any, to the exclusion of his brother and nieces. This was his primary intention; and it was only upon a state of circumstances which has not happened, that he meant to make any provision for the Plaintiffs. Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can be possibly put upon them. Every string should give its sound. (2 Burr. 770. 2 P. Wms. 282.) The child or children are to be raised and educated by his wife out of the income of the property left to her, as well as all the property he dies possessed of. The whole of his property (32) must, therefore, have been retained for that purpose; which is inconsistent with the immediate bequest of any part of it to his nieces. The child marrying or arriving at age in his wife's life-time, shall have an equal share of all his negroes, as well as all his other property, except the land left to his wife. This must signify a child's part of all his property, including that claimed by the complainants. But the third clause is strongly impressed with the intention, and is calculated to remove all doubt; for by that he gives to his child or children all that he had given to his wife, or all that she should inherit from his estate. Now he had given her part, and directed her to retain the whole for the purpose of raising his child; or to use his own expression, "all the property I die possessed of." The property he had given to her, and that which she should inherit from his estate, (by which inaccurate expression, he meant all the rest which was to be retained by her) he gives to his child upon her death. Desirous to make his meaning still plainer, he concludes this clause with the words, "*or for want of such heirs as hereafter* *mentioned.*" These words run through and govern every succeeding clause in the will, by which the same property is disposed of; none of which were intended to be effectual in the event which has occurred, namely the birth of a posthumous child. The opposite construction creates an unaccountable repugnance between different parts of the will, and tends to defeat the only child of the testator of a considerable proportion of his little *all;* which his father so anxiously endeavored to secure to him.

(33)

SAMUEL DARK v. JOAB BAGLEY and BRITTON HARRIS.

From Chatham.

Equity will decree a specific execution of a parol contract for the sale and purchase of lands, although there has been no partial performance, if the contract be proved by such evidence as affords to the mind a conviction no less satisfactory than that which arises from a contract in writing.

It is no objection to such a decree, that the purchase money was to be paid *in the fall.* That is a period sufficiently certain.

Samuel Dark filed his bill in the Court of Equity for Chatham county, against Joab Bagley and Britton Harris, and therein charged, that Joab Bagley being seised of a tract of land containing five hundred acres, situate in the county of Chatham, in the month of September, A. D. 1810, contracted and agreed to sell the same to the complainant upon the following terms, to-wit, "that complainant should pay to him the sum of four hundred and fifty dollars in the fall of 1811; other four hundred and fifty dollars in the fall of 1812, and other four hundred and fifty dollars in the fall of 1813; making in all the sum of thirteen hundred and fifty dollars." And to secure the payment of these respective sums, complainant agreed to execute to Bagley, within some short time, his bonds with security; and upon the execution of these bonds, Bagley was to convey the land to complainant, with general warranty. The bill then charged that in pursuance of this agreement, complainant within some short time, executed bonds with good security, and tendered them to Bagley, at the same time requesting Bagley to convey to him the land: That Bagley refused to accept the bonds or convey the land: And that Britton Harris having notice of the agreement which had been entered into between complainant and Bagley for the sale and purchase of the land, agreed with

Bagley to purchase the land, at the price of twelve hundred and fifty dollars, and to make payment thereof within a time which Bagley alleged would better suit his conven-
(34) ience: That in pursuance of this agreement, Bagley conveyed the land to Harris, who entered and took possession: That Harris having taken a deed for the land with notice of complainant's equity, was a trustee of the legal title for complainant, who prayed that Harris might be decreed to convey to him such title to the land as he had acquired from Bagley, and that an account for the rents and profits might be taken; and that Bagley might be decreed to accept the bonds which had been tendered to him, and convey the land with general warranty.

Harris put in his answer, and denied that he had any notice of the agreement charged in the bill before he purchased the land from Bagley, paid the purchase money and received a conveyance. He alleged that he had purchased the land for a valuable consideration, and he prayed the benefit of this fact and his want of notice, in the same way as if he had relied upon them by way of plea. Complainant replied to the answer, and depositions having been taken by the parties, the cause came on to be heard at March Term, 1818, (the bill having been filed in February, A. D. 1811) when the following issues were submitted to a jury, to-wit:

1. Was the agreement charged in the bill relative to the sale and purchase of the land therein described, entered into between Samuel Dark and Joab Bagley?
2. Was the defendant, Britton Harris, a purchaser for a valuable consideration, without notice of Samuel Dark's claim to the land under the agreement charged?
3. If the agreement charged was entered into, did Samuel Dark perform his part of the said agreement as far forth as by the terms thereof, he was bound to do?

The jury found in favor of the complainant upon each of the issues; and the counsel for complainant having moved for a decree according to the prayer of the bill, the motion was opposed upon two grounds; 1st, That the bill sought to enforce a parol contract relative to the sale of lands,
(35) where there had been no partial performance of the contract: 2d, That the contract was too vague and indeterminate, there being no days appointed on which the purchase money was to be paid. The case was ordered to be sent to the Supreme Court, where it was argued by *Ruffin*

for the complainant, and *Norwood* for the defendant; and at this term,

TAYLOR, Chief-Justice, delivered the opinion of the Court: The object of this bill is to compel the specific execution of a parol agreement made between Bagley and the complainant for the sale of a tract of land lying in Chatham County. The contract set forth in the bill has been established by the verdict of a jury; and it is admitted that the bonds which were to be given by the complainant, were executed by him and tendered to the defendant, according to the terms of the agreement; or to speak with more precision, the bonds are admitted to have been tendered,* and the jury have found that the complainant has performed his part of the agreement. All the facts necessary to a decree for the complainant have been established, and the case is ripe for a final determination, if the Court has authority to make one, under all the circumstances. Its authority to do so, has been contested upon two grounds; 1st, Because the contract was made by parol, and it is alleged there has been no partial performance 2d, Because no days were appointed on which the money was to be paid; the agreement being merely, that the several payments were to be made in the fall of the respective years when they became due.

With respect to the first objection, it might be sufficient to answer, that the practice of decreeing the specific (36) execution of parol agreements for the conveyance of land, has been too long established in this state, and too uniformly persevered in by the Courts of Equity, to be now abolished, because the propriety of its origin may be doubted. It is not easy to arrive at a certain conclusion one way or the other, as to the practice in England before the Statute of Frauds and Perjuries. There are authorities both ways, and the more ancient ones are in favor of the jurisdiction. In 1467, it is said by a Judge, "that if I promise to build you a house and do not perform my promise, you have your subpœna;" and in 1505, FINEUX, Chief-Justice, speaking of the different remedies given in the Courts for the non-performance of contracts,

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*In making up the issues in this case, the allegation of the bill that the bonds had been executed and tendered, was omitted to be submitted to the jury. The case was amended in this Court by the counsel, by having the allegation of the bill as to the execution and tender of the bonds, admitted as true.

observes, "that if a man bargain with another that he shall have his land for 10*l.* and that he will make him an estate therein by such a day, and he does not make the estate, an action upon the case lies; but in that he shall only recover damages; but by subpœna, the Chancellor may compel him to execute the estate, or imprison him." (1 Maddock, 287.) On principle, too, it would seem that such a jurisdiction might have been correctly exercised. Before the statute of frauds and perjuries in England, the only contracts and dispositions of property, real or personal, which were necessary to be put in writing, were of property lying in grant, as rights and future interests, and that species of real property to which the name of incorporeal hereditaments applies. These were always authenticated by a deed; and the statute of 32 Hen. 8, ch. 1, which gave to the owners of land a partial power of disposing of their estates by will, directed such will to be declared in writing; some contracts were also required by customary laws to be in writing: but as a general rule, no writing was necessary; for even estates in land might be completely transferred by a symbolical delivery in the presence of neighbors, however useful the precaution might be of recording the transaction by a charter of feoffment. (Roberts on Frauds 2.) It seems indeed that
(37) Courts of Equity were cautious in former times, as they ought always to be, of relieving bare parol agreements for lands, where the agreement has not been signed by the parties, nor any money paid. (1 Fonb. 175.) And as this branch of their jurisdiction is governed in a peculiar degree by sound discretion, cases may be found where they have refused relief for the want of a part performance. The subject is examined in the late edition of "*Sugden's Law of Vendors,*" 101, 114. "There are four cases in Tothill which are previous to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute, would not execute a mere parol agreement not in part performed. In the first case, which was heard in the 38th Eliz. relief was denied, because it was but a preparation for an action on the case. (Tothill, 135.) In the two next cases, which came on in 9th Jac. 1, parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase money; but the particular circumstances of these cases do not appear." (Ibid. 206, 228.)

The subject is left by this writer nearly in the same obscurity in which it was before, not from any defect in him, but from the intrinsic difficulty of the question. Enough has been cited to shew that the jurisdiction is fairly applicable to the case before the Court. While, however, no doubt is entertained of the jurisdiction, the Court is fully impressed with the importance and necessity of an extremely guarded and cautious exercise of it. As men cannot by law part with their freeholds without deed, so Equity should follow the law as nearly as may be, and require complete and satisfactory proofs that a contract for the sale of land was deliberately made. There should be not only full evidence, but a decided preponderance in favor of the existence of the contract; affording to the mind a conviction not less satisfactory than that which arises from a contract in writing. Loose conversations, inadvertent assertions and inchoate agreements, ought to be carefully guarded against; and where it is (38) understood that a Court of Equity will not lend its aid to enforce a parol agreement, unless it be established by plenary evidence, a salutary caution will be inspired in those, who, in good faith, make such contracts in future.

As to the second objection, though no day was fixed for the payment of the bonds, yet it was agreed that the complainant should pay at the fall: he consequently had until the last day of the fall to do so. As where a man is bound to pay money on a certain day, or in a certain year, he has to the last minute of the first, and the last minute of the last day of the last, to make the payment. The same reason applies to a certain season. But if it were otherwise, as no objection was made on that ground when the bonds were tendered, it is to be intended that the days of payment were fixed according to the seller's wish.

The substance of the decree agreed upon by the Court is, that a reference be made to the Master to compute the sums due by the contract, with interest from the times they respectively became due, until a day to be prescribed by the Court of Equity for Chatham, for the payment of the money. That he also take an account of the rents and profits from the last day of November, 1811, when the complainant was to have been put into possession, until the aforesaid day; which latter sums, when ascertained, are to be deducted from those due on the bonds; and the residue, if any, is to be paid to the Defendant Bagley; upon which, Harris should be decreed to convey the land described in the bill, to the complainant, with covenants against his own incumbrances, and a covenant against all claiming under him; in which deed Bagley should join and enter into a general warranty; the deed to be approved by the Master.

(39) JOHN GREEN *v.* WILLIAM P. MANGUM.

From Wake.

Suit on the act of 1741, ch. 11, to recover the penalty given for excessive usury. Defendant pleaded the general issue, and on the trial moved to nonsuit the Plaintiff, because the suit was not brought in the county where the usury was committed—Motion disallowed. This matter should have been pleaded in Abatement, under the act of 1777, ch. 2.

Objections to the jurisdiction of the Superior Courts must, in general, be pleaded: and they can be taken on the general issue, only in cases where the action is in its nature local, as relating to the possession of land, or where a court has no jurisdiction at common law, or where no court of the State has jurisdiction, or where it has been taken away by statute, without prescribing the manner in which the objection shall be taken, and in cases of the like sort.

This was an action brought to recover the penalty given by the act of Assembly of 1741, ch. 11, to restrain excessive usury. The Defendant pleaded in chief, and the cause came on for trial; when it appeared in evidence, that the Plaintiff was an inhabitant of Wake county, where the suit was brought, and the Defendant was an inhabitant of Orange county, where it was alleged the usury had been committed; whereupon a non-suit was awarded on the motion of the Defendant's counsel. A rule being obtained on behalf of the Plaintiff to shew cause why the non-suit should not be set aside, the same was referred to this Court; and at this term,

TAYLOR, Chief-Justice, delivered the opinion of the Court: This question depends upon the construction of the ninth section of the act of 1777, ch. 2, which directs that various actions therein enumerated, and amongst them, "all suits on penal statutes," shall be commenced in the Court of the district where the cause of action shall arise, and not in any other district. It then proceeds to regulate the bringing of other suits in different courts according to the residence (40) of the parties, and concludes with these words, "and where any action shall be brought otherwise than is herein described, such action or suit may be abated on the plea of the defendant"

Before the passage of this act, an action on the Statute of usury might be brought in any court of record in the State, by the very terms of the act of 1741, ch. 11. For the statute of 21st Jac. 1, which confines actions on penal statutes to the counties where the offence was committed, does not extend to penal statutes, subsequently passed; as appears to be well settled by many decisions: though Lord Holt entertained a different opinion. (Rex *v.* Gaul, 1 Salk. 372–3—French *v.* Cochran, Andrews 25.) The action then remained transitory as it was at common law, and the Plaintiff might declare in any county he pleased, subject to the ordinary power of the court of changing the *Visne.* No alteration in this respect was made by the Court Law enacted in 1746, ch. 11; which in allotting the then existing counties to the three Superior Courts, (if they may be so called) of Edenton, Edgecombe and Wilmington, only provides that where the *Visne* is laid in certain counties, the trial shall be by *Nisi Prius*, at the three places last mentioned: But as to laying the *Visne*, though it directs that local actions, or rather all actions shall be laid in the county where the cause of action shall arise, yet it expressly excepts criminal cases and transitory actions. When the act of 1777 made penal actions local, it also provided the manner in which the want of jurisdiction should be excepted to; and this manner differed from that which had been prescribed by the 21st Jac. 1, ch. 4. According to which, if the offence be not laid and alleged to have been committed in the county where it was in truth committed, the Defendant, upon the general issue, shall be found not guilty. And I think that this difference in the provision of the two laws must be attended with a correspondent difference in practice, and that the Defendant cannot, under the act of 1777, avail himself of the want of jurisdiction after pleading the (41) general issue, as he might have done by pleading in abatement. The objection taken by the Defendant in this case, is properly to the jurisdiction of the Court: he might have availed himself of it in the shape of a plea to the jurisdiction in abatement of the suit; and it is more fit to be decided by the Court than by the jury upon the general issue. The statute of 21st Jac. already cited, enables the Defendant to plead the general issue, and give the special matter in evidence: yet, under expressions thus comprehensive, the Defendant cannot avail himself of any matter which goes to the jurisdiction of the Court. (4 Term Rep. 109.) In the case of the *Kinlocks* (Foster 16), they objected to being tried before the Special Commission, sitting in England, on the ground that the offence was committed in Scotland. But it was held that the objection being in the nature of a plea to the jurisdiction of the Court, could not be made on the issue of *not guilty;* nor could any evidence in support of the objection be received on that issue. The general rule to be collected from the books is, that, in general, objections to the jurisdiction of the Superior Courts must be pleaded; and, wherever the objection can be taken on the general issue, I think it will be found to apply only to those cases where the action is in its nature *local*, as relating to the possession of land (3 Mass. 24); or where a Court has no jurisdiction at common law; or where no Court of the State has jurisdiction; or it has been taken away by statute, without prescribing the manner in which the objection shall be taken; as in the case of Parker *v.* Elling (1 East. 352), when a public statute enacted that "no action for any debt not amounting to forty shillings and recoverable by that act, shall be brought against any person residing within the jurisdiction of the Court of Requests in the island of Ely, in the Courts at Westminster." An action was brought on such a debt, and the objection was taken on the general issue. The opinion of the (42) Court takes the distinction which appears to me to reach the whole length of this case. "Some acts of Parliament, giving a peculiar jurisdiction, require that it shall be pleaded, in case the parties claiming the privilege shall be sued elsewhere; and others direct that a suggestion shall be made on the roll; *and in those cases the methods pointed out by the respective statutes must be pursued.* But here is a general law, of which we are bound to take notice, &c." It is true that an intimation was given by the same judge in *Taylor v. Blair* (3 Term Rep. 452), that even on the general issue, if the objection were made at the trial, the Plaintiff might be non-suited; but the decision itself is founded on the same principles stated in the opinion of the Court in *Parker v. Elling.* In conformity with these cases is the opinion of Chitty (1 Plead. 421)—"The methods pointed out by the respective statutes must be strictly pursued."

(43)

HOWELL JONES and others *v.* CHARLES EDMONDS.

From Northampton.

Writs of *fieri facias* bearing teste of the same term, and put into the hands of the sheriff at the same time, although issued upon judgments recovered at different terms, have no preference one over the other: the creditors stand in equality of right, and if the property levied upon do not bring enough to satisfy all the writs, the creditors must be paid in proportion to their respective demands.

A Judgment creates no lien upon the lands of the debtor, where a *fieri facias* is sued out. The statute of Westminster 2d ch. 18, does not in express terms make the lands liable, which the debtor had at the time of the judgment: It is by implication and judicial construction, and by the election made by the Plaintiff to sue out the writ given by the statute, that a judgment is a lien upon land.

The statute of Geo. 2d, ch. 7, had three objects, 1st, To make land liable to and chargeable with all just debts. 2d, To make them assets for the satisfaction of debts in the same manner as real estates, by the law of England, are liable to debts due by bond or other specialty. 3d, To make them subject to the like remedies with personal estates: And the act of 1777, ch. 2, giving the *fieri facias* against "lands and tenements," as well as goods and chattels, is in conformity with this third object of the act of George 2nd.

A judgment is still a lien upon a moiety of the lands, of which the debtor was seized at the time of its rendition, if the creditor sue out an elegit: but if he refuse to sue out a *fieri facias*, the lands are bound only as chattels.

After judgment at the instance of A. but before suing out execution, the debtor conveys his lands in trust to secure a debt which he owes to B. this conveyance gives to B. a preference, and his debt must be paid before A. shall have his judgment satisfied out of the land.

Samuel Nicholson and Hulon Grizzard recovered judgments in Northampton County Court, against Charles Edmonds; and he being indebted to E. B. Freeman, conveyed to him in trust, a tract of land, to secure the debt; this conveyance was made after the recovery of the judgments aforesaid. He was then sued by other creditors, and judgments were recovered in Northampton County Court at December Term, 1817: And from that term executions issued, as well upon these latter judgments as upon the judgments of Nicholson and Grizzard. (44) All these executions were delivered to the Sheriff on the same day, and he made the following return thereon: to wit,

"STATE OF NORTH CAROLINA,
Northampton County.

"The following executions came into my hands on the 9th day of December, 1817: Samuel Nicholson *v.* Charles Edmonds for the sum of 700 dollars, with interest from the 14th September, 1816, and costs—Littleberry Mason *v.* Charles Edmonds, for 78 dollars, with interest from the 4th December, 1817, and costs—Collin W. Barnes *v.* the same, for 88 dollars, with interest and costs—Howell Jones *v.* the same for 329 dollars, with interest and costs—James Wood *v.* the same, for 106 dollars, with interest and costs—Hulon Grizzard *v.* the same, for 100 dollars, with interest and costs: All returnable to Northampton County Court, March Term, 1818. There being no goods and chattels to be found, the said executions were levied upon a tract of land, whereon the said Edmonds resided; and after advertising the same for sale, I exposed the same to public sale on the 3d day of February, 1818, when Thomas Branch became the last and highest bidder at the sum of 1062 dollars: of which sum 148 dollars are claimed by E. B. Freeman. by virtue of a deed in trust, prior to all the judgments, except those of S. Nicholson and H. Grizzard. I pay into the clerk's office the sum of 1018 dollars."

Signed, "JOHN PEEBLES, Sh'ff."

Whereupon a question arose, which, if any, of the creditors were entitled to a preference in having their judgments satisfied? And if none were entitled to a preference, in what proportions the money was to be distributed among them?

The case was taken by consent of parties to the Superior Court, and by that Court was ordered to be sent to the Supreme Court: And at this Term, judgment was given that the money should be distributed among the judgment creditors in proportion to their respective demands, after the debt to E. B. Freeman was paid.

BY THE COURT—The money, concerning the distribution of which the question in this case arises, was raised by the Sheriff upon several executions, all of which bore teste and were put into his hands at the same time. The claim (45) of one creditor is founded upon a deed of trust, operating as a lien upon the land, and the sum secured by it must consequently be first paid. With respect to the judgments, those of Nicholson and Grizzard were prior in point of time, and these creditors claim a right to be paid in the next place, because the money was raised by the sale of land. The rights of the several parties cannot therefore be adjusted, unless the Court meets and decides the question, Whether a judgment be a lien upon the lands of the debtor?

It is very evident from the authorities, that lands were not at common law, liable to execution at the suit of a subject, except on judgment against the heir on an action on the bond of his ancestor. (3 Rep. 12.) The statute of Westminster 2d, ch. 18, which first made them chargeable, gives the Plaintiff his election to go against the goods and profits; or against the goods and a moiety of the lands of the Defendant: Which election has given name to the writ of *Elegit.*

The statute does not, in terms, make the land liable, which the Defendant had at the time of the judgment; but the writ of elegit, framed by the Court, and used in practice ever since the passing of the act, commands the Sheriff to cause to be delivered a moiety of the lands, of which the Defendant was seised on the day of the judgment. It is by implication, therefore, and judicial construction, that a judgment is a lien upon land; and by the election made by the Plaintiff to sue out the writ given by the state.

The statute of Geo. 2d, ch. 7, renders land in the then colonies, as well as chattels, liable to the payment of debts; and makes three provisions in the same clause: 1st, That lands shall be liable to and chargeable with all just debts. 2d, That they shall be assets for the satisfaction of debts, in the same manner as real estates, by the law of England, are liable to debts due by bond or other specialty. 3d, That they shall be subject to the like remedies with personal (46) estates. By referring to the manner in which lands were liable to debts due by bond, and calling them *assets*, the statute pointed to the case of an heir sued upon the bond of his ancestor, in which bond the heir was bound. In that case the judgment would be for the whole of the land descended, which the heir was seised of at the commencement of the suit. (Dyer 373, b.—Plowd. 441.—3 Rep. 12.) As this was the only case where, at common law, the whole of the land could be taken in execution at the suit of a private person, it was probably inserted to make the contrast to the elegit, where only a moiety was liable. Making land subject to the like remedies with personal estate, placed it on a footing with personal estate in every case where those remedies are resorted to: and the act of 1777, ch. 2. is in conformity with this exposition.

The conclusion appears to be, that a judgment may still operate as a lien upon a moiety of the lands of which the Defendant was seised at the time of its rendition, if the Plaintiff sue out or pray an elegit: But if he resort to the *Fieri Facias*, the lands are only bound as chattels. All the creditors in this case, therefore, except E. B. Freeman, stand in equality of right, and are to be paid in proportion to their respective demand.

(47)

Den on the demise of ELIZABETH JACOCKS *v.* MOSES GILLIAM.

From Bertie.

A parish register of marriages, births and deaths, kept pursuant to the act of 1715, is good evidence to prove pedigree, and that the several persons, whose pedigree is thus proved, are within the savings of the statute of limitations.

Tenant in tail aliens, and in his conveyance, "he, for himself, his heirs, executors and administrators, doth covenant and agree, the premises to him the said A. B. his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, for ever hereafter to warrant, secure and defend." He then dies, and real assets descend to the issue in tail, of greater value than the lands aliened. A discontinuance of the estate tail is not worked; for the covenant is not a covenant real annexed to the lands, whereby the alienor and his heirs are bound either on a voucher or judgment in a warranted charter to yield other lands of equal value in case of eviction of the tenant by better title. But it is a personal covenant to defend the possession, a covenant for quiet enjoyment, the breach of which is to be repaired, not in land, but in damages, and these must be primarily paid out of the personal fund.

The disuse of real actions has, from necessity, given to the warrantee a right to bring an action of covenant, in which he recovers damages according to the value of the land at the time the warranty was entered into. If he could not bring this action, he would be without remedy; but the same remedy does not exist for rebutting the heir; for if the ancestor hath left real or personal assets, the purchaser may be recompensed.

This action of ejectment was tried in Bertie Superior Court at October term, 1816, and a verdict was found, under the charge of the Court, for the Plaintiff. A rule to show cause why a new trial should not be granted was obtained, and ordered to be sent to this Court for the opinion of the Judges upon the following case:

The land for which the action was brought, was granted to John Hardy in the year 1717; and by his will, dated in 1719, duly executed to pass lands, was devised to his daughter Elizabeth Hardy in tail. The lessor of the plaintiff, to prove that she was the issue in tail, called one Hardy as a (48) witness, who produced a book in manuscript, which, he said, was the parish register; and he turned to the following entries made therein, to wit:

"Nathaniel Hill and Elizabeth Hardy married by the Reverend Mr. Newmans." The date omitted.

"Michael Hill, son of Nathaniel and Elizabeth Hill, born October 20, 1726."

Hardy Hill, son of Michael Hill and Elizabeth Hill, born February 21, 1756."

"Elizabeth Hill, daughter of Hardy Hill and Jennett Hill, born January 18, 1776"

"Hardy Hill died Sept. 5, 1777."

"Jonathan Jacocks and Elizabeth Hill married March 17, 1791."

The witness deposed, that the first and second entries were made in a hand-writing unknown to him; the third he believed to be in the hand-writing of Edward Raynor, deceased, former clerk. The other entries were made by himself. He further deposed that Jonathan Jacocks died in the year 1810. The lessor of the Plaintiff relied on these entries to prove her pedigree, and that she was the issue in tail; and, also, that the several tenants were within the savings of the statute of limitations. The Defendant contended that this book was not admissible in evidence, and, if admissible, that it was insufficient to prove the pedigree, or that the tenants were within the savings of the statute.

It appeared in evidence that Michael Hill, on the 5th day of May, 1748, conveyed in fee the land in question to John Hill for a valuable consideration; and the Defendant deduced title regularly from John Hill to himself. It was admitted that real assets descended from Michael Hill to his issue in tail, Hardy Hill, father of the lessor of the Plaintiff, of greater value than the land in question. And it was contended that the warranty in the deed from Michael Hill to John Hill, and the real assets descended to the issue in tail of Michael Hill, worked a discontinuance of the estate tail. The deed contained a covenant of seisin, and the clause of warranty was in the following words; "Furthermore, I, the (49) said Michael Hill, for myself, my heirs, executors and administrators, do covenant and engage the above demised premises to him the said John Hill, his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever forever hereafter to warrant, secure and defend."

Gaston, for the lessor of the Plaintiff.—Under the feudal law an intimate connexion existed between the lord and his tenants. In war they were his soldiers, in peace his farmers: they fought his battles, supplied his table, upheld his splendor, did him homage, and owed to him allegiance. Their children were his wards; they could not marry, nor be received into the succession of the feud, without his assent. They were his subjects, and he their little sovereign. These duties were by reason of the lands which they held, and which were originally of his donation. He owed to them protection, and by his whole force ensured to them the enjoyment of their feuds; and if they were evicted of them by reason of his inability to protect their enjoyment, be owed to them other feuds of equal value.

After the statute of *quia emptores*, when alienations were permitted to be held of the chief lord of the fee, this relation did not exist between grantor and grantee; but the grantor might stipulate that this obligation of protection should rest on him and his heirs. Such a stipulation was an engagement to perform the same duties of a feudal chief as if the lands were holden of him. This was a warranty; it was a covenant real, annexed to the lands, whereby the warrantor and his heirs were bound, either on a voucher or judgment in a warrantia chartæ, to yield other lands of equal value in case of eviction of the tenant by better title. (Gilbert's Tenures, 124, Co. Lit. 365, a.) Its ordinary form was "*Ego et Heredes mei, illi et Heredibus et assignatis suis warranti zabimus.*" (2 Bl. Com. Appendix.) It induced a *quasi* feudal relation between the warrantor and his heirs, on one (50) side, and the grantee and his heirs and assigns, on the other. It could only be enforced by *warrantia chartæ*, by voucher, (or aid prayer,) or by rebutter. This last was a mere consequence of its being enforceable by *warrantia chartæ*, or by voucher, to prevent the circuity which would have arisen from the heir recovering the land, and then by *warrantia chartæ* or voucher, yielding other lands of the same value.

Wherever such a warranty existed, these were the only remedies. The personal writ of covenant broken, for damages, could not be brought. (Bacon, Covenant C. Brown 19. Keble 821. Hob. 4. Noy 131. 4 John. 11. Law of Cov'ts 13, 107.) Ancient feudal covenants, "warranties" have long since ceased, and are substituted by covenants to defend the possession, the remedy for breach of which, is in damages, and by the personal action of covenant. (4 Dall. 442. 4 John. 11. 2 Bl. Com. 304.)

Is the covenant here the old obsolete warranty, or the modern ordinary covenant for quiet enjoyment? In the first place, it is altogether improbable that the parties had any design to induce a feudal relation and a feudal duty, obsolete in England, and never known in our country, and that the grantee was willing to accept a warranty, the performance of which was to be enforced by a resort to remedies never practised here. In the next place, the words of this deed seem to show clearly that the parties intended to express by them the ordinary covenant for quiet enjoyment, for the breach of which the grantee was to be compensated in damages: The words are, "I the said Michael Hill, for myself, my heirs, executors and administrators, do covenant and engage to warrant and defend."—The remedy is for damages, not for land; and they must be primarily paid out of the personal fund. We must reject part of the deed as utterly insensible, to make it a warranty; and this the Court will refuse to do where it is possible to give a sensible (51) interpretation to every part of the deed.* (Williams *v.* Codrington, 1 Ves. 512, 514.)

*The Deed from Michael Hill to John Hill was in the following words:

"NORTH CAROLINA

"To all People to whom these presents shall come—Greeting:

"Know ye, that I Michael Hill, of the County of Bertie, in the Province aforesaid, for and in consideration of the sum of sixty pounds current money of Virginia, to me in hand paid by John Hill, of the province and County aforesaid, the receipt whereof I do hereby acknowledge, and myself therewith fully satisfied and contented thereof, and of every part and parcel thereof do exonerate, acquit and discharge the said John Hill, his heirs, executors and administrators, forever, by these presents, have given, granted, bargained, aliened, conveyed and confirmed, and by these presents do freely, fully, and absolutely give, grant, bargain, sell, alien, convey and confirm unto him the said John Hill, his heirs and assigns forever, one messuage or tract of land, situate, lying and being in the province and county aforesaid, containing by estimation, four hundred and twenty-four acres, lying on the east side of Rocquis Pocoson, and bounded, &c.: To have and to hold the said granted and bargained premises, with all appurtenances and privileges and commodities to the same belonging or in any wise appertaining, to him the said John Hill, his heirs and assigns forever, to his and their only proper use, benefit and behoof forever: and the said Michael Hill, for me, my heirs, executors and administrators do covenant, promise and grant to and with the said John Hill, his heirs and assigns that before the ensealing hereof, I am the true, sole and lawful owner of the above bargained premises, and I am lawfully seised and possessed of the same in mine own proper right, as a good, perfect and absolute estate of inheritance in fee simple, and have in myself a good right, full power and lawful authority to grant, bargain, sell, convey, and confirm the said bargained premises in manner as above said; and that the said John Hill, his heirs and assigns, shall and may from time to time, and at all times forever hereafter, by force and virtue of these presents, lawfully, peaceably and quietly have, hold, use, occupy, possess and enjoy the said demised and bargained premises, with the appurtenances, free and clear and freely and clearly acquitted, exonerated and discharged, of and from all manner of former or other gifts, grants, bargains, sales, leases, mortgages, entails, jointures, dowries, judgments, executions, incumbrances and extents. Furthermore, I the said Michael Hill, for myself, my heirs, executors and administrator, do covenant and engage the above demised premises to him the said John Hill, his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure

At this term, the Court gave judgment upon the points submitted in this case. They agreed upon the first point, that the parish register was properly admitted in evidence, and if the jury believed the evidence of Hardy, this (52) register, with his testimony, proved the pedigree of the lessor of the plaintiff, and that she was the issue in tail; and also that the several tenants were within the savings of the statute of limitations. On the second point, the Court were divided in opinion; the Chief-Justice and Judge Hall being of opinion that the covenant in the deed from Michael Hill to John Hill was a covenant for quiet enjoyment only; and Judge Daniel, that the covenant was a covenant real, annexed to the land, and by reason of the real assets of greater value than the land in question, descended to the issue in tail, had worked a discontinuance of the estate tail.

TAYLOR, Chief Justice, delivered the opinion of a majority of the Court:

The two questions presented by the record are, as to the admissibility of the book in evidence; and, whether the deed from Michael to John Hill operated a discontinuance of the estate tail.

1. The registry of births, marriages and burials, is directed to be kept by the register of the precinct, where there is no clerk, by the act of 1715: and as the book produced was proved to be the original one which had been thus kept, it affords legal evidence of the marriages and births, at least on a question of pedigree. A book kept by public authority, is necessarily evidence of the facts recorded in it, for the convenience of the public. (1 Salk. 282.) And the law (53) will guard the purity of such a memorial by making it indictable to insert a false entry. (Sid. 71-2.) It is very possible to prove a marriage or pedigree by general reputation; but where precision is required in dates, it is

and defend. In witness whereof, I have set my hand and seal this fifth day of May, one thousand seven hundred and forty-eight.

MICHAEL HILL. (Seal.)

Signed, sealed and delivered in presence of
Robert Hunter,
Moses Hunter,
Michael Maning,

At May Term, 1748, of Bertie Court, this deed was acknowledged in open Court, and registered.

extremely difficult to arrive at it, more especially in a country and climate, where from various causes, the population undergoes frequent changes.

The registry book, confirmed as it was in this case, by proof of its authenticity, afforded to the jury a simple and satisfactory method of tracing the pedigree for nearly a century; and excluded all that doubt, confusion and uncertainty, which usually hang over such investigations, when depending upon the memory of witnesses. It would tend greatly to the public advantage, if the directions of the act of 1715, on this subject, were more generally observed.

2. The other question is not free from difficulty; but after mature reflection upon it, the decided preponderance of our judgment is, that the covenant contained in the deed of Michael Hill did not discontinue the estate of the heir in tail. The law has made a clear distinction between a covenant *real* and a covenant *personal;* and to a warranty alone, in the original and proper sense of the term, has it imparted the effect of intercepting the descent to the heir; because he and not the executor is bound to warrant and secure the land to the covenantee and his heirs. The use and adoption of the form in which the ancient warranty is expressed, would indicate the intention of the parties to avail themselves of such remedies as appertain to the warranty only; and the change of that form will justify the reasonable inference that they designed to abide by the security which is afforded by a covenant. A general warranty extends to all mankind: the usual covenant is only for the acts of the grantor and his ancestors: but a covenant will bind the personal assets, which makes such security better than a warranty. (2 Bl. Com. 304.) The various covenants contained in this deed further shew that the parties meant to rely upon the (54) modern covenants; for all are contained in it, except that for further assurance, which there were no means of the tenant in tail giving. It is then right that the purchaser should have the full benefit of the remedies which the deed furnishes; but we can find no authority for the Court to superadd to a covenant which is clearly personal, the remedy by rebutter, which exclusively belongs to that real covenant which is called a warranty. The words which bind the executors and administrators of Michael Hill, must be rejected, before this can be done, or the clause be construed as a warranty. That would be altering the contract of the

parties, and, as it appears to us, frustrating their intention. The words in this deed are similar to those in *Williamson* v. *Codrington*, (1 Ves. 512,) where it was held by Lord Hardwicke that if a person obliged himself, his heirs, executors and administrators to warrant and forever defend the lands, negroes, cattle, and stock conveyed, it amounted to a covenant, and not to a warranty. (3 Cruise 65.)

The disuse of real actions has from necessity, given the warrantee a right to bring an action of covenant, in which he recovers damages according to the value of the land at the time the warranty was entered into. If he could not bring this action, he would be without any remedy; but the same necessity does not exist for rebutting the heir; because if the ancestor left real or personal assets, the purchaser may be recompensed. Our opinion consequently is, that this warranty did not descend upon the heir; and that John Hill had nothing more than a bare fee simple, determinable on the death of Michael Hill, by the entry of his issue in tail; and that the Plaintiff is entitled to judgment.

DANIEL, Judge.* It appears from the case, that the lessor of the Plaintiff is the grand-daughter and heir at (55) law of Michael Hill, who was seized in fee-tail of the land in question. Michael Hill, for a valuable consideration, conveyed the land by deed of bargain and sale to John Hill in fee simple. It is admitted that real assets descended from Michael Hill to his issue in tail of greater value than the land in dispute.

If tenant in tail release to his disseisor, and bind himself and his heirs to warranty, and die, and this warranty descend to his issue, it is a discontinuance by reason of the warranty. (Littleton, sec. 601.) Lord Coke, in his Commentary on this section of Littleton, says, "The reason why the addition of the warranty in this case maketh a discontinuance, is that which has been said, to-wit: If the issue in tail should enter, the warranty (which is so much favored in law) would be destroyed; and therefore to the end if assets in fee simple do descend, he to whom the release is made may plead the same, and bar the demandant; by which means all rights and advantages are saved. (Co. Lit. 328, b.) It is by virtue of the warranty, with assets descended, that a discontinuance is effected, whether the conveyance be by bargain and sale, lease and release, or release to a disseisor.

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*His honor Judge Henderson, having been of counsel in this case before his appointment to a seat in this Court, the honorable John Joseph Daniel, Esquire, was commissioned by the Governor to sit in this and in several other cases in which Judge Henderson had been of counsel.

It is said, if the clause in the deed from Michael Hill to John Hill had been in the words following, to wit: "I, the said Michael Hill, for myself and my heirs, *do warrant*, &c." they would certainly have made a warranty; but that the clause as it stands is not a warranty; that there is only a covenant to warrant, which has not the operation in law to work a discontinuance. I know of no distinction, in a deed which conveys the fee, between a warranty and a covenant to warrant and defend, if the heirs be bound. What is a warranty? Lord Coke says "a warranty is a *covenant real* annexed to lands or tenements, whereby a *man and his heirs are bound to warrant the same;* and either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those evicted by
(56) a former title, or else may be used by way of rebutter.
(Co. Lit. 365, a.) So "I and my heirs *shall warrant,*" &c. doth create a warranty. (Ibid, 384, a. Wood's Conveyancer, 573.) Littleton says "that this word and verb *warrantizo* maketh the warranty, and is the cause of warranty, and no other word in our law." But he has not confined us down to any particular part of this verb; he has not pointed out the mood or tense, which shall be used in the warranty clause of a deed. In the present case the words "*covenant* and *engage* to *warrant,*" &c. are as clear a declaration of the intention of the parties, as the words "I and my heirs *shall warrant,*" which we have seen is a warranty good in law. Lord Hardwicke labored to make the case of *Williamson v. Codrington* (1 Ves. 512) a personal covenant; but he does not intimate an opinion that it might not have well been construed a warranty. In the case of Minge *v.* Gilmore, (1 Law Repos. 15) the clause of the deed from Minge to Gilmore is very much like the one now under consideration. In this case it was held to be a warranty, which barred the tenant in tail. This was so determined in the State Courts, and also in the Federal Court. I think a new trial should be granted.

(57)

ALEXANDER LONG *v.* LEWIS BEARD and JONATHAN MERRILL.

From Iredell.

The owner of an old established Ferry hath a right of action against him, who either keeps in his neighborhood a free ferry, or a ferry at which he receives pay for transporting people, carriages, &c. he not being authorised by the County Court to keep such ferry, whereby an injury accrues to the owner of the old established ferry.

There are two counts in the declaration; one charges that the Defendants had, without authority from the County Court, erected a free ferry in the neighborhood of the old established ferry of the Plaintiff, and by transporting persons, carriages, &c. at such ferry, had caused great loss of gain and profit to the Plaintiff—The second count is like the first, except that it charges that Defendants made large gains and profits—After a general verdict for the Plaintiff upon these counts, the Court will not arrest the judgment: for the Plaintiff is entitled to judgment upon either.

The ground of this action is not the gain made by the Defendants, but the injury sustained by the Plaintiff, in consequence of the acts of the Defendants.

Alexander Long being the owner of an old established ferry across the River Yadkin, on the road leading from Salisbury to Salem, Lewis Beard and Jonathan Merrill made a road to a point on the River one mile below Long's ferry; and having erected a boat, they transported travellers, waggons and carriages across the river—they were the proprietors of the land over which they made the road; but the County Court had not recognised it as a public highway, nor authorised them to keep a ferry. Sign Boards were put up, giving notice to travellers that the road led to a *free ferry.*—Long brought an action on the case against Beard and Merrill, to recover damages for the injury which he sustained by reason of their ferry; and there were two counts in the declaration: In the first, it was charged that the Defendants had opened a road, established a ferry and transported persons and carriages across the river so near to the (58) Plaintiff's ferry, as to cause him to lose a great portion of the gains, profits and benefits of his ferry. This count did not charge that the Defendants took any pay or toll for transporting persons, &c.—The second count was in all respects like the first, except that it charged that the Defendants made and received to themselves great gains and profits by transporting persons and carriages, &c.*

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*The first count in the declaration was as follows:

"Alexander Long, of the County of Rowan, complains of Lewis Beard and Jonathan Merrill in custody, &c. For that whereas the said Alexander Long, before and at the time of committing the several grievances

This suit was instituted in the Superior Court of (59) Law for Rowan County, and removed for trial to Iredell, where it came on to be tried, at October Term, 1817, and a verdict was found for the Plaintiff and his damages were assessed to two hundred dollars. Whereupon it was contended on behalf of the Defendants, that the judgment should be arrested; for that the jury had found a general verdict for the plaintiff, and that upon the first count in the declaration, no recovery could in law be had. The case was ordered to be sent to this Court, where it was argued by *Norwood* for the Plaintiff, and *Badger* for the Defendants.

HALL, Judge.—It is admitted that the Plaintiff (60) would be entitled to judgment, if the declaration contained only the count which charges that the Defendants had set up a ferry and transported persons, &c. for pay. But as the other count does not charge that persons, &c. were transported for pay, and as damages have been given generally upon both counts, it is said the judgment ought to be arrested. By the acts of 1779, ch. 10, and 1784, ch. 14, the Plaintiff, as the owner of a ferry, is bound to keep boats, &c. in good repair for the transportation of travellers,

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by the said Lewis Beard and Jonathan Merrill hereinafter next mentioned, was and from thence hitherto hath been and still is possessed of a public ferry, duly appointed and settled by the Court of Pleas and Quarter Sessions for the County of Rowan aforesaid, situate and being in the said County over and across the River Yadkin, at or near the mouth of Grant's Creek, on a public road leading from the town of Salisbury on the southwest side of the said river, to a certain House of Entertainment lately in the possession of one Obadiah Smith, and now in the possession and occupation of one Frederick Thompson, in the County aforesaid, on the northeast side of the said river, and thence to Salem, Danville and other places; at which ferry of the said Alexander Long, by means of the boats and ferrymen kept by the said Alexander, all horsemen and other travellers, waggons and other carriages, passing and repassing from Salisbury aforesaid to and beyond the said house of entertainment, and from the said house of entertainment to Salisbury aforesaid, crossed and passed the said river: and the said Alexander by means of the premises made to himself great gains, benefits and profits: Yet the said Lewis Beard and Jonathan Merrill well knowing the premises, but contriving and wrongfully, fraudulently and unjustly intending to injure, defraud and prejudice the said Alexander in this respect, and wrongfully, fraudulently and unjustly to deprive him of the gains, benefits and profits of said ferry, and to induce all horsemen and other travellers, waggons and other carriages, passing and repassing from Salisbury aforesaid to the said house of entertainment, and from the said house of entertainment to Salisbury aforesaid, not to cross the said river at the said ferry of the said Alexander, whilst he the said Alexander was so possessed of the said ferry as aforesaid, and is in the receipt and enjoyment of the gains, benefits and profits thereof, to-wit, on the tenth day

&c. and is subject to high penalties for any neglect in this respect. As a compensation for doing what these acts of Assembly require at his hands, he is permitted to take pay according to the rates fixed by the County Courts. Now it is a matter of indifference to the Plaintiff, whether the Defendants transport people and carriages across the river for pay or without pay: the effect is the same to him; he is injured, his profits are diminished, whilst the obligation upon him to keep up his ferry remains the same.

But it is said, it would be a hard case if no person were at liberty under any circumstances to set his neighbour across the river in a private boat, unless it be for the private use of the owner of said boat. It certainly would be a hard case, if such were the law. But it is clear that in such a case, an action would not lie. When, however, it appears that the owner of such a boat opened a way on each side of
(61) the river, sufficient for carriages, &c. to go to the place where the boat is kept, that posts with sign-boards are erected on said roads, directing travellers the way to a free ferry, and by all these means injuring a neighbor who has an old and established ferry, and who is bound by

of November in the year of our Lord one thousand eight hundred and thirteen, in the County of Rowan aforesaid, the said Lewis and Jonathan did open and clear a way, sufficient for horsemen, waggons and other carriages conveniently to pass and repass therein; turning out and leaving the said road leading from Salisbury to the ferry of the said Alexander as aforesaid, at or near the house of one George Smith, situate on the south-west side of the said river, thence a short distance along an old road leading from that house to a ferry in the possession of John Long, and thence turning out of the said old road and crossing the river a short distance, to wit, one mile below the ferry aforesaid of the said Alexander, and half a mile above the ferry in possession and occupation of the said John Long as aforesaid: and thence to the said house of entertainment, on the north-east side of the said river; and from that time hitherto, have and still do keep the said way open and sufficient for waggons and other carriages to pass and repass conveniently therein. And the said Lewis and Jonathan, on the day and in the county aforesaid, did erect and set up posts at the several forks of the said roads and way, with boards thereon directing travellers along the said way to the place where the same crossed and still crosses the said river, and giving notice that there was a free ferry kept there; and hitherto have and still do keep up the said posts and boards. And the said Lewis and Jonathan, on the day and in the County aforesaid, did provide and keep on the said river at the place where the way so opened by them crossed and still crosses the same, a boat sufficient for the carriage and transportation of travellers, waggons and other carriages across the said river, and persons to work the said boat, and hitherto have and still do keep the said boat and persons to work it at that place. And the said Lewis and Jonathan, on the day and in the County aforesaid, and at divers other law to keep it up, a special case appears, in which the Plaintiff is undoubtedly entitled to recover. It is further said, that the setting up of such ferries is for the public good. That portion of the public who pass them may think so: but the disinterested part of the public, can think nothing for their good which brings destruction or injury to an individual: and that such destruction or injury must follow, is certain, when we reflect upon the obligations which the Plaintiff is under to keep his ferry in good order, for the transportation of travellers when called upon. Connected with these considerations, is the strong fact, that by the law, the Courts, and they only, are authorized to grant to individuals the privilege of establishing ferries. This privilege has not been granted to the Defendants in this case. We need not enquire what were the motives of the Defendants in setting up this ferry; whether they intended to benefit the public, injure Long, or finally benefit themselves, is altogether immaterial.

There are no authorities advanced against the opinion now given. The case of Blisset *v.* Hart (Willes 508), mentioned in the argument of this case, was an action brought for an injury similar to the one now complained of: in that case, there were many counts in the declaration, and yet in neither was it charged that the Defendant had received pay for the transportation of travellers. I am of opinion, that upon the facts charged in the first count an action can be sustained, and that judgment should be rendered for Plaintiff.

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days and times between that day and the commencing of this suit, did transport and convey over and across the said river, by means of the said boat and the persons working the same, at the place where their said way crossed and still crosses the said river, divers and very many persons, waggons and other carriages, travelling and passing from Salisbury to the said house of entertainment on the north-east side of the said river, and from the said house of entertainment to Salisbury aforesaid, without any legal right or authority so to transport and convey the said persons, waggons and other carriages across the said river. By means of which premises the said Alexander hath been and still is greatly injured, prejudiced and aggrieved, and hath lost a great portion of the gains, benefits and profits of his said ferry, to which he was legally entitled as aforesaid, to wit, at the county of Rowan aforesaid."

In the second count, it was charged that they had transported and conveyed persons, waggons and carriages over and across the river without any legal right or authority so to do, "whereby the said Lewis and Jonathan made and received to themselves great gains and profits; by means of which said last mentioned premises, the said Alexander had been and still is greatly injured and aggrieved, and hath lost a great portion of the gains, benefits and profits of his said ferry, to which he was legally and justly entitled as aforesaid, &c."

DANIEL, Judge.—The first count in the Plaintiff's declaration charges the Defendants with having opened a road, established a ferry, and transported persons and car- (62) riages across the river, so near to the Plaintiff's ferry as to cause him to lose a great portion of the gains, profits and benefits of his ferry. This count does not allege that the Defendants took any pay or toll for transporting persons or carriages. The law gives this action, not because the Defendants have derived a *benefit*, but because the Plaintiff has sustained *an injury*, in consequence of the act or acts of the Defendants. The ground of the action is the consequential injury which the Plaintiff has sustained: whether the Defendants have been gainers or losers by the transaction is not to be enquired into. Blackstone in 3 Com. 219, says, "If a ferry be erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For, where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of the king's subjects; otherwise he may be grievously amerced. But setting up a trade, mill or school near another, is not a nuisance, although the custom be diverted from the original establishment; because a multiplication of such establishments is beneficial to the community at large, and the owners are not by law subject to any fine if they desist from or shut up such establishments."

The act of 1779, ch. 10, declares, that any person who owns a public ferry and refuses to keep it up for the rates allowed by the County Courts, shall, for every offence, forfeit fifty pounds. The act of 1784, ch. 14, requires the County Courts to take bonds from the owners of ferries, in the sum of five hundred pounds, conditioned to keep good boats and proper hands to transport persons and carriages; and declares that any person detained for the lack of such boats and hands, may warrant and recover from the owner; and subjects such owner to actions for all injuries done and property lost by any lack of care at his ferry. The act of 1764, ch. 3, is cumulative, and does not repeal the common law remedy. In consequence of the law having thrown so many penalties upon the owner of a ferry, he shall not be molested (63) in his benefits. I am of opinion that judgment should be rendered for the Plaintiff.

TAYLOR, Chief Justice, concurred.

Den on demise of DARIUS AMYETT *v.* ALLEN BACKHOUSE.

From Craven.

A. being seized of lands, on the 1st day of December, 1811, sells the same to B. *bona fide*, and for a valuable consideration, and agreed to execute a conveyance within ten days thereafter: and within that time he executed such conveyance. On the 2d day of December C. sued out an original attachment against A, which, on that day, was levied on the said lands and returned to Court. A default was entered against A, but there was no judgment of condemnation against the lands. Final judgment against A. being obtained, a *fieri facias* issued against his goods and chattels, lands and tenements, which was levied on the said lands, and at the sale thereof made by the sheriff were bid off by C, who entered and took possession. B. is entitled to recover these lands, for the suing out of the *fieri facias* after final judgment is a waiver of the lien created by the levy of the attachment. To have the benefit of this lien, C. ought to have sued out a *venditioni exponas*.

Under the act of 1777, ch. 2. property attached is directed to remain in the custody of the sheriff until final judgment, and "then be disposed of in the same manner as goods taken in execution on a writ of *fieri facias;* and if the judgment shall not be satisfied by the goods attached, the Plaintiff may have execution for the residue." When goods taken in execution are to be disposed of, the proper mode is to sue out a *venditioni exponas;* and if the goods be not of the value of the debt, the Plaintiff may have a *venditioni exponas* for those seized, and a *fieri facias* for the residue, in the same writ. But if the Plaintiff, instead of a *venditioni exponas*, sue out a general *fieri facias*, he waives the seizure under the first execution, and destroys the lien which it created.

George Lane being seized of the land in question on the 1st day of December, A. D. 1811, sold the same to the lessor of the Plaintiff, for the consideration of 425 dollars. He gave a bond to make a title thereto within ten days; and (64) on the tenth day of December aforesaid, Lane executed a conveyance pursuant to the bond. On the 2d day of December, A. D. 1811, the Defendant sued out an attachment against Lane, which, on the same day, was levied on the land aforesaid. The suit founded on this attachment, was returnable to December term of Craven County Court, which term commenced on the 9th day of the month. At that term a default was taken against Lane, and at March term, 1812, the default was executed, and a verdict rendered for the Plaintiff of 49*l.* 2*s.* 6*d.* No judgment of condemnation was entered. An execution was issued to the Sheriff of Craven, which recited generally that a judgment had been rendered for said sum, and commanded him, "that of the goods and chattels, lands and tenements," of the Defendant Lane, he cause the aforesaid sum to be made. This execution was levied by the Sheriff on the lands in question, and the lands were sold by the Sheriff and purchased by the

Defendant for the sum of five dollars, in the name of his infant son, to whom the Sheriff executed a deed. This deed recites, generally, a judgment of March term, 1812, an execution tested of the same term, and a seisin in land on the day of such teste.

The Court charged the jury, that under these circumstances, the title of the Defendant's son, under whom he held, was bad: but that the Plaintiff must recover by the strength of his own title, and that by reason of the lien created by the attachment, the Plaintiff had not a good title. The jury found a verdict for the Plaintiff; and a rule for a new trial being obtained, it was sent to this Court.

For the lessor of the Plaintiff, it was argued that it was provided by the act of the second session of 1777, ch. 2, sec. 25, "that original attachments shall be returned to Court and be deemed the leading process; and the same proceedings shall be had thereon as on judicial attachments." The 23d section, in regard to judicial attachments, provides that "the goods so attached, if not replevied or sold, (65) shall remain in the custody of the sheriff until final judgment, and *then be disposed of in the same manner as goods taken in execution on a writ of fieri facias; and if the judgment shall not be satisfied by the goods attached, the Plaintiff may have execution for the residue.*"

When goods are taken on a *fieri facias*, and it be desired that they should be *disposed of*, the proper mode is to sue out a *Venditioni exponas*, commanding a sale of the goods so taken. If the goods so taken are not to the value of the whole debt, the Plaintiff may have a *Venditioni exponas* for those seized, and a *fieri facias* for the residue, in the same writ. (Tidd's Practice 934. Sargeant on Attachments, Appendix.) Such is precisely the form to be observed on attachments.

But if the Plaintiff, instead of a *Venditioni exponas*, sue out a general *fieri facias*, he waives the seisure under the first execution and destroys the *lien* on the property seized on, by it (Eckhols *v.* Graham 1 Call's Rep. 492), and so it was expressly decided in this Court in the case of Scott's Executors *v.* Hill, Sheriff of Franklin. (Term 181 .)

Whatever lien therefore was created by the attachment, it being precisely that with the lien on goods taken in execution on a *fieri facias*, such lien was *waived* by the Plaintiff's suing out a general *fieri facias* and purchasing under it.

In the second place, the sale to Amyett was antecedent to the attachment, and it is not the design of the attachment laws, to subject to such a process any property but what truly and equitably, as well as nominally and legally, belongs to the debtor. (3 Massachusetts Rep. 558, 564.)

Lastly, the verdict conforms to the justice of the case; and the Court will not disturb it to keep in possession a man who clearly has no right.

For the Defendant, it was argued, that although no judgment of condemnation appeared of record, yet in this case enough appeared to induce the Court to presume that (66) such a judgment had been rendered. But it may not be material to the main question of *lien*, whether there were such a judgment formally rendered: for the levying of the attachment created a lien, and this lien is not waived by suing out the *fieri facias.* This execution commands the Sheriff to levy the debt out of the Defendant's property, that is, such property as is subject to the debt: which is different in different executions. If it be an execution regularly continued from term to term, it authorizes a seizure of property conveyed by Defendant *bona fide* at any time since the teste of the first *fieri facias*, although prior to the teste of the execution under which it is seized; for as to that *fi. fa.* it is the Defendant's property. So also as to a fraudulent conveyance. In the present case, the property being subjected to the payment of this debt, the purchaser is permitted to shew that his title relates back beyond the teste of the *fi. fa.* or the rendition of the judgment. The recital of the judgment in the *fi. fa.* is sufficient to identify it; a more full recital could only do the same.

This is likened to the case of a *fi. fa.* where there has been a former levy, which, it is said, discharges that levy. A levy under a *fi. fa.* is a discharge of the debt, at least until the property is sold and its insufficiency ascertained, or the levy waived and the property actually restored to the Defendant. When the Plaintiff, therefore, sues out a *fi. fa.* after having caused a levy to be made, as that act could not be done without waiving the levy, and thereby discharging the lien, he is concluded from alleging that the levy continues, his act being inconsistent with it. Attaching property does not satisfy the debt; it is to secure its payment when recovered; and the property cannot be sold and applied to its discharge without a *fi. fa.* or some other process. But a Sheriff may sell without a *Venditioni exponas:* One seizure is to secure, the other to satisfy. The first requires the further aid of the Court to effectuate the object of seizure, which object being the raising of the money for the Plaintiff, the process which issues to effectuate it can only suspend during its (67) operation, the lien created by the first seizure, on a presumption that the debt will be raised by this process. But the lien is restored when it appears that the debt was not so raised.

If there were no judgment of condemnation, it may possibly render the final judgment erroneous: but until reversed, it has all the effects of the most regular judgment. A reversal would only give a right to the money lost, not to the land sold to raise it—But a judgment of condemnation is nothing more than the Plaintiff's adopting the property of the Defendant for his person, and thereby excusing his appearance. The after judgment pre-supposes this to have been done.

HALL, Judge, delivered the opinion of the Court:

In this case the attachment created a lien on the land; and had that been continued by the Defendant's proceeding thereon; obtaining a judgment of condemnation of the land and then final judgment, issuing execution, and having the land sold by virtue thereof, his title would be good. But this has not been done. The only effect of issuing the attachment and having it levied, was to give the Court jurisdiction, whereby judgment might be obtained. In this case the levy was made upon the land, but no judgment was subsequently entered condemning the land to satisfy the final judgment which might be rendered. When this final judgment was rendered, the lands levied on were thrown into the general mass of landed property belonging to the Defendant, by taking out an execution against his property generally as is done in ordinary cases. The lien created by the attachment was lost, and the title to the land vested in the lessor of the Plaintiff; the deed to him being executed long before either the judgment was obtained or an execution issued. Let the rule for a new trial be discharged.

(68)

REBECCAH PATTON, by her Guardian JOHN PATTON *v.* JOSEPH CLENDENIN and JOHN MACDANIEL.

From Orange.

A. devised four hundred acres of land to his son William, and added to the devise, "I allow my son William to maintain my wife as long as she lives," William sold the land to Defendants; and the widow filed her bill, charging that at the time of their purchase, they had notice of the devise, and that it was agreed between them and William, that they should maintain her during life, and therefore the land was sold to them at a price much below its true value. The bill prayed that Defendants might be decreed to afford to Complainant, a maintenance, &c.

A motion to dismiss the bill disallowed; and in considering this motion, it is not necessary to decide whether the devise to William charges the lands with the maintenance of the widow; for the bill charges that upon the sale to the Defendants, a support for complainant was left in their hands, being deducted from the value of the lands for that purpose.

A consideration is necessary to raise an Equity, but not to transfer it; and when once raised, it is to be transferred like all other rights, upon legal evidence of the will of the owner to make the transfer.

The bill charged that John Patton being seised and possessed of a valuable real and personal estate, departed this life in the year 1799, having previously published in writing his last will, duly executed to pass his lands; which will, after his death, was admitted to probate in Orange County Court. That in and by the said will, he devised "to his son William four hundred acres of land, including the plantation whereon I (the testator) now live, likewise I allow my son William to maintain my wife as long as she lives." That complainant was the widow of the testator, who some time after his death became of nonsane mind, and John Patton was appointed her guardian: that William Patton, the devisee, took possession of the land devised to him, and in the year 1802, sold and conveyed the said land to the Defendants Joseph Clendenin and John MacDaniel.

The bill then charged, that by the terms of the devise to William Patton, the maintenance of the Complaint was charged upon the land devised; that the defendants (69) had notice of this charge upon the land before they purchased from William Patton, and that it was expressly understood between them and him, that they were to take upon themselves the burthen of supporting the complainant during her life; and that in consequence of this understanding, the land was sold to them at a price much below its real value. That at the time of their purchase she was living on the land; that they or one of them placed her in the care of one John Brigham, giving to him one hundred dollars for her use, and taking from him a bond conditioned for the maintenance of complainant; that this fund had been exhausted and Brigham neglected to give her a maintenance; that her guardian, John Patton, had applied to the Defendants to advance money, or provide for her such a maintenance as she was entitled to, and they had refused. The bill prayed that an account might be taken of her maintenance, and the Defendants be decreed to pay such sum as might be found due on such account, and be further decreed to pay for her annual support thereafter such sum as the Court might think reasonable.

Upon the hearing of this case, it seems to have been the object of the counsel, on both sides, to place the decision on the question, "whether the devise to William Patton charged the maintenance of the complainant upon the land;" and an attempt was made to get this question decided upon a motion to dismiss the bill. This motion was referred to this Court, and the bill and a copy of John Patton's will, with the motion to dismiss, formed the case. This Court disallowed the motion, without deciding the question arising under the will, saying that the agreement charged in the bill, between William Patton and the Defendants, raised an Equity in favor of the Complainant.

HENDERSON, Judge, delivered the opinion of the Court:

The motion to dismiss, should not prevail; because the bill states, that upon the sale to defendants, a support for the Complainant was left in their hands, being deducted from the value of the land for that purpose. It is there(70) fore a trust fund, raised upon a valuable consideration for the benefit of complainant, who stands not as a mere volunteer, but one having a claim upon the devisee for support. Not that we believe a consideration necessary in the transfer of an Equity, but only necessary to raise an Equity; and when once raised, to be transferred like all other rights, *upon legal evidence of the will of the owner to make the transfer.* It is therefore unnecessary to decide the question, whether the devise of the Complainant's maintenance was a charge upon the land.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF NORTH CAROLINA *v.* NATHAN SMITH.

From Craven.

A promissory note drawn by A. and indorsed by B. was made negotiable at the Newbern Branch of the State Bank of North Carolina, and payable on the 11th December. B. lived in the Town of Newbern near to the Bank. Notice of non payment of the note by the drawer, was not given to the indorser until the 17th December, this delay of giving notice, discharges the indorser from all liability.

This was an action of assumpsit against the Defendant as the indorser of a promissory note, the note was dated on the eleventh of March, 1814, drawn at nine months, and made negotiable and payable at the Newbern Branch of the State Bank of North Carolina. The defendant's indorsement was admitted; and it was proved that previous to the time when the note fell due, it had been offered at the Newbern Branch of the State Bank, for discount, by the Defendant, and had been discounted for his benefit. It was proved that the makers had provided no funds for the payment of the note when due. It was approved by the Clerk of the Bank, that from its establishment, the course of business had been for the President and Directors of the Branch to meet at the Bank on Tuesday and (71) Friday evenings in each week, when all notes offered to the Bank were either discounted or rejected by them—That at the time this note fell due, the debtors to the Bank were permitted to renew their notes by paying an eighth of the debt, and giving a new note for the other seven eighths—That on Friday the 16th of December, a note for renewal was offered by three of the makers, but without the name of one of the makers, and without the endorsement of the Defendant. This note was not discounted, and on Saturday the 17th of December, notice was left at the house of the Defendant as indorser. It was also proved to be the custom of the Bank to retain interest by way of discount for three days beyond that on which the note was payable on its face; and that at the time of this transaction and for some time previous, it had been the custom of the officers of this Branch, to give notice to indorsers within three, four, five or six days, after the day of payment mentioned in the face of the note; and that no order of the Bank at that time existed, fixing a time of giving notice to indorsers; the Clerk, whose duty was to give the notice, using his discretion, in some cases delaying the notice longer than in others, that he might not by an early notice of the delinquency of the maker affect his credit with the indorser, nor injure the Bank by what might be deemed a rigorous proceeding. The Defendant resided in the town of Newbern, within three hundred yards of the Bank.

Upon the trial of this case, the Court charged the jury that the Defendant was exonerated from his liability as indorser by the delay to give him notice. The jury found a verdict for the Defendant; and a rule for a new trial being obtained, the same was ordered to be sent to this Court.

Gaston, for the Defendant.—The engagement of an indorser on a promissory note is conditional merely, viz: that he will be responsible, according to the usages among merchants in the negotiation of bills of exchange and (72) promissory notes, and not otherwise. 7 Masst. Rep. 495. It is important to the interests of the community that the law which requires diligence in the holder of negotiable instruments, to enable him to exact payment from one only conditionally liable, should be strictly enforced. Id. 487. The question of the sufficiency and reasonableness of the notice has been decided by the competent tribunal; and unless a manifest error has been committed, that decision ought not to be overruled.

The reasonableness of the notice is regarded as a question of fact for the jury, assisted by the Court: it is a mixed question of law and fact. Chitty 238. 6 East. 14, 15. 2 Hayw. 48. There are no circumstances in this case to lessen the rigor of the rule of diligence; but every circumstance to render its exact performance proper. This was a business note, negotiated at a bank, and the indorser living within three hundred yards: the note fell due on the 11th of December, and notice was not given until the 17th.

In England three days of grace are allowed, and are regarded as a right, although at first they were purely gratuitous. Chitty 271, 4 Term Rep. 151, 2.

In Massachusetts the three days of grace are not allowed, unless stipulated in the contract. 4 Massts. Rep. 251. They are allowed in New York and Pennsylvania. 1 John. Ca. 328. 2 Caines, 343, 4, Id. 127. 5 Binney, 541. With us no rule is fixed on this subject. But if the three days of grace be claimed as matter of right, still notice has not been given within reasonable time, for three days over have elapsed. Notice ought generally to be given to an indorser on the very day of dishonor; or, at all events, the next, if he live in the same town; and if he do not, then by the next mail. Chitty, 320, 238. 1 Term Rep. 167. 2 Id. 186. 6 East. 3. Nearly a century ago it was holden that (73) two days delay, after the days of grace, was unreasonable (2 Strange, 829), and three days delay in the same city is unreasonable delay. 11 John. 187.

BY THE COURT.—We think the Court below instructed the jury correctly. The residence of the defendant, within a short distance of the bank, rendered the most prompt notice equally necessary and convenient. Allowing the days of grace, the notice should have been given on the 15th; but it was delayed to the 17th. Let the rule for a new trial be discharged. 2 Wheat. 376.

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(74)

GEO. WILLIAMS and GARRISON WILLIAMS *v.* JOHN HOWARD.

From Rowan.

A. conveyed to his son B. in absolute property, certain negro slaves: and B. being about to join the army, conveyed the slaves to his brother C. for five years, for the support of his father. Executions issued against the father and levied upon these slaves. He and his son C. applied to D. to befriend them. D. agreed to advance the money due on the executions, and bid off the slaves when sold by the Sheriff: and A. and C. were to have until a certain day thereafter, to redeem the slaves. The money was tendered to D. by the day, and he refused to receive it. A. and C. filed their bill to redeem; and the five years having expired, a decree was objected to on the ground that the absolute interest in the slaves was in B. and he was not a party to the bill—objection disallowed.

This is a contract of agency, in which the agent is called on to transfer and surrender up property acquired for his principal in execution of an express contract: For as between these parties, complainants are to be considered the owners of the slaves, and the Defendant is concluded from contesting their title.

He who bargains with another, placing confidence in him, is bound to shew that a reasonable use has been made of that confidence.

A decree was also objected to, upon the ground, that Equity will not decree the specific execution of a contract relative to negro slaves—objection disallowed. For all the principles which induce a Court of Equity to compel the specific execution of a contract for the sale of lands or some favorite personal chattel, apply with equal force to the case of slaves.

George Williams and Garrison Williams his son, filed their bill of complaint in the Court of Equity for Rowan county against John Howard, and therein charged, that some time in the month of September, A. D. 1806, two executions were issued against the property of George Williams, which were levied by the Sheriff of Rowan on two negro slaves, viz, a woman named Sylvia and her child named Hannah, which negroes were then, and had long been in the possession of Complainants: that although they did not claim the negroes in absolute property, yet they claimed an interest in them. That the negroes had been conveyed by the complainant, George Williams, to his son Henry Williams, by deed of gift, in March, 1801: (75) That Henry having enlisted as a soldier in the army of the United States, transferred the negroes to his brother Garrison Williams, for the term of five years, for the support of the father, George Williams: and George, the father, and Garrison, the son, were in possession of the negroes under this conveyance at the time the Sheriff of Rowan levied the two executions aforesaid.

The Complainants applied to John Howard to befriend them, by advancing the money due on the executions; and proposed to him, that if the money which he should advance were not paid to him by the 25th December, 1806, he should have the negro woman Sylvia to work for the use of the money, until it should be paid. To this proposition Howard did not assent; but professed himself willing to be their friend, and advised them to let the negroes be sold, saying that he would become the purchaser and restore the property to the Complainants upon the terms of their first proposition; assigning as a reason for this course of proceeding, that the negroes could not thereafter be taken to satisfy other demands against George Williams. Complainants agreed that this course should be taken, and thereupon it was further agreed, that after the sale, the Complainants should have the possession of the negroes until the 25th December next following; and if the money which Howard should advance on the executions, were not paid to him by that time, he should take the negro woman Sylvia into his possession, and have the benefit of her labor for the interest of the money, until the money should be paid.

On the day of sale, notice was given by Howard to the Sheriff, that he was to purchase the negroes as the friend of Complainants; and they were purchased accordingly at a price little exceeding one-half of their real value. The negroes remained in the possession of the complainants until the 19th day of November. On the 18th of that month, Garrison

Williams, one of the Complainants, went to Howard's house for the purpose of paying to him the money. Howard was not at home. (76) Williams made known his business to Howard's wife, and requested her to receive the money. He remained in the neighborhood, intending to go to Howard's house again on the next day and pay to him the money. Howard finding that Williams had raised the money, went early in the morning of the next day to Williams' house and took away the negroes. On the 21st November, Williams tendered the money to Howard, and demanded the negroes. Howard refused to receive the money or deliver up the negroes, and then claimed them as his absolute property.

The bill then prayed that an account might be taken of the hire of the negroes since they came to the possession of Howard, and also an account of the money advanced by Howard for the complainants at the time of the sale: That Howard might be decreed to surrender up to the Complainants the said negroes, upon his receiving such sum of money as might be found to be due to him upon the taking of the accounts, &c.

Howard filed his answer, and denied the agreement charged in the bill, and denied that any agreement had been entered into between Complainants and him for the purchase and redemption of the negroes.

The bill was filed early in the year 1807; and at April term, 1818, the case came on to be heard; when the following issue was submitted to a jury, viz.: "Was it agreed between the complainants, or either of them, and the Defendant, that the Defendant should bid off the negroes Sylvia and Hannah, named in the bill, at the sale about to be made of them by the Sheriff of Rowan county, and that Complainants, or either of them, should have a reasonable time thereafter to repay the money to Defendant: and the Defendant upon receiving the money, relinquish his title to the negroes to the Complainants, or either of them?"—The jury found this issue in favor of the Complainants, and the counsel for Complainants moved for a decree according to the prayer of the bill. This motion was opposed upon two (77) grounds.

1. That it appeared by the bill, that Henry Williams was the absolute owner of the negroes and that he

ought to be a party to the bill before any decree could be pronounced.

2. That the bill sought to enforce the specific execution of an agreement relative to a personal chattel. That Equity would not enforce such agreements, except in a few peculiar cases, none of which were like the present, but would leave parties to their redress at law.

The case was sent to this Court, where it was argued by *Norwood* for the Complainants, and by *A. Anderson* for the Defendant.

TAYLOR, Chief-Justice—The material allegations of the bill are, that two executions were issued against the Complainant, George Williams, which were levied upon two negro slaves, Sylvia and her child, then in his possession, and that of his son Garrison, the other Complainant. These slaves had been conveyed by George Williams to his son Henry, who, at the time of levy, was a soldier and absent with the army. Henry had conveyed the slaves to Garrison for five years, for the use and benefit of their father George. With a view of paying off the executions, the Complainants applied to the Defendant for a loan of money, and proposed as the consideration of his advancing it, that if it were not repaid by the 25th December next following, he might have the use of Sylvia until the money could be paid. The Defendant did not assent to this proposition; but professing to be friendly to the Complainants, advised them to submit to a sale, and agreed to become the purchaser and restore the property, upon the terms of the first proposition; alleging, as a reason for this course, that the property would thereby be put out of the reach of any subsequent demand against George Williams.

The Complainants agreed that the sale should take place, and the Defendant agreed to become the purchaser (78) and restore the slaves to the Complainant's possession, where they were to remain until the 25th December; at which time if the money were not paid to the Defendant, Sylvia was to pass into his possession, and continue there until it should be paid.

The Defendant became the purchaser, at a price something more than half of the value of the slaves, occasioned by its being generally known that he purchased for the Complainants. The negroes remained in the Complainants' possession until the 19th November, when the Defendant took them away. A tender of the money was made on the 21st November to the Defendant, which he refused to accept, claiming an absolute title in the negroes.

The jury have established the agreement stated in the bill, and the only question is, Whether the Court can decree a re-conveyance under the circumstances of this case?

The Equity of the Complainants arises out of the contract of the Defendant, who, by promising to befriend them and pointing out the way in which he could do it most effectually, occasioned a suspension of their endeavors to resort to other means of raising the money; and who, by informing the Sheriff that he was to purchase for them, and allowing the same thing to be understood generally by the persons attending the sale, prevented them from bidding, and thus acquired the property to himself at an under value. The Defendant, by his own agreement, became a trustee for the Complainants: shall he, in violation of every principle of rectitude and good faith, be permitted to set up a title in himself, bottomed upon a palpable breach of that trust? Shall he be allowed to gain a considerable benefit, at the expense of those whom he *probably* prevented from procuring the money by other means, and whom he *certainly* inspired with confidence in his proffered friendship? There is no maxim of justice recognized in this Court, which will lend its sanction to such a defence. 3 Ves. 170.

The jurisdiction of the Court, under circumstances (79) similar to the present, is affirmed by many cases in the books; and notwithstanding the limited view of contracts respecting lands, which the statute of frauds and perjuries compels the English Judges to take, yet, in cases of fraud, it has been held that no writing is necessary. The case of Thynn *v.* Thynn, 1 Ver. 296, involves both fraud and trust, and shews that the former makes an exception to the statute. In Lamas *v.* Baily, 2 Ver. 627, relief seems to have been intercepted solely by the statute; and it is therefore an authority for the complainants.

The sale under the executions was made on the suggestions and advice of the defendant, avowedly to protect the property from subsequent demands: he has no right, therefore, to pervert the sale to any other purposes, more especially to that of becoming the equitable owner of the property. Such a transaction will not bear the scrutiny of this Court. Wilkinson *v.* Brayfield, 2 Ver. 307.

The rule is extensively applicable, that he who bargains with another, placing confidence in him, is bound to shew that a reasonable use has been made of that confidence. Young *v.* Peachy, 2 Atk. 254. And it is an inference deducible from the same maxim of justice, that he who acquires a legal title by breach of trust, and by taking advantage of another's necessities, which he was instrumental in producing, shall not, in this Court, set up the title against him from whom he obtained it. It is a fair presumption, that the complainants could have exerted themselves with the same success to get the money upon the levy of the execution, that they did in November when the tender was made, if they had not been lulled into a fancied security by the assurances of the Defendant.

Though the Complainants were not the absolute owners of these Slaves, and so it appears from the bill, yet they had a fiduciary possession, which they were bound to protect for the benefit of their absent relation. He, upon his return from the army, would have a right to call upon them, at least upon *Garrison*, for a restoration of the property: and it is fit that the Defendant should be compelled to replace things in the state and condition from which his fraudulent conduct removed them. In relation to the Defendant, the Complainants are the owners of the slaves; for his conduct has concluded him from contesting their title.

It is not certain that the question arises in this case, as to the power of the Court to decree the specific execution of a contract relating to chattels: but if it be presented, I have no hesitation in giving it as my decided opinion, that the reason of the rule does not apply to slaves: That they form an exception, for reasons equally cogent, or more so, than those applicable to land. With respect to other chattel property, justice may be done at law by damages for non-performance, and therefore equity will not interpose: But for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart.

HENDERSON, Judge.—Upon a simple contract of agency, much extraneous matter is introduced by the bill and the Defendant's argument as to the claim which the Complainants had to the slaves before the Defendant purchased them, as their agent. To me it appears entirely immaterial what motives induced the deed of gift to Henry Williams, what were the terms or conditions thereof, or whether there was any gift at all. And the transfer from Henry to the Complainants, or to one of them, is of the same character. As well might a man charged with horse-stealing, avert the punishment of his offence, by shewing that the prosecutor had defrauded the former owner of the horse by getting him at half price. In this case, the agent is called on to transfer and surrender up property acquired for his principal in execution of an express contract of agencv, where he had used the Complainants' money. For the Defendant by (81) agreeing to advance the money for his principal, made the money his principal's, and gave to himself a right to call on him for so much loaned or advanced to his use: and no reason can be assigned why he should not transfer that legal title with which he clothed himself, either with a view of honestly performing his contract of agency, or with a dishonest intent of avoiding it. In either case he has no defence. When the question shall be brought before the Court, it will be time to consider whether these Complainants are trustees for Henry Williams, either from the manner in which he left the property with them, or from any new engagement. It would be a disgrace to our law, if such subterfuges were to prevail.

Upon the other question raised in this case, that is, as to the power of this Court to decree a specific execution of a contract for the sale of slaves, I think it is not presented: For it is only required of the agent to fulfill his trust, and disrobe himself of that legal title with which he has iniquitously clothed himself. But if the question were presented, I have no doubt upon it; for all the principles which induce a court of Equity to compel a specific execution of a contract for a sale of lands, or some favorite personal chattel, apply with equal, if not stronger force, to the case of slaves.

The Master will therefore take an account of the annual hire or value of the slaves, since the Defendant took them into possession, with interest from the expiration of each year: also of the money advanced by the Defendant in their purchase, with interest to the time of the offer to pay to the wife of the Defendant; and upon Complainants' paying the difference, if there be any, the Defendant will transfer, by a quit claim bill of sale, to be approved by the Master, the slaves in question, with their increase since he had possession of them, with covenants against his incumbrances, and the claims of all persons derived under him, and immediately thereafter deliver to Complainants the said slaves with their said increase: and the Defendant will pay the (82) costs of this suit, including the Master's fee for performing the service hereby directed, and all expenses of carrying this decree into execution.

HALL, Judge, concurred.

CHERRY *v.* SLADE'S ADMINISTRATOR.

From Martin.

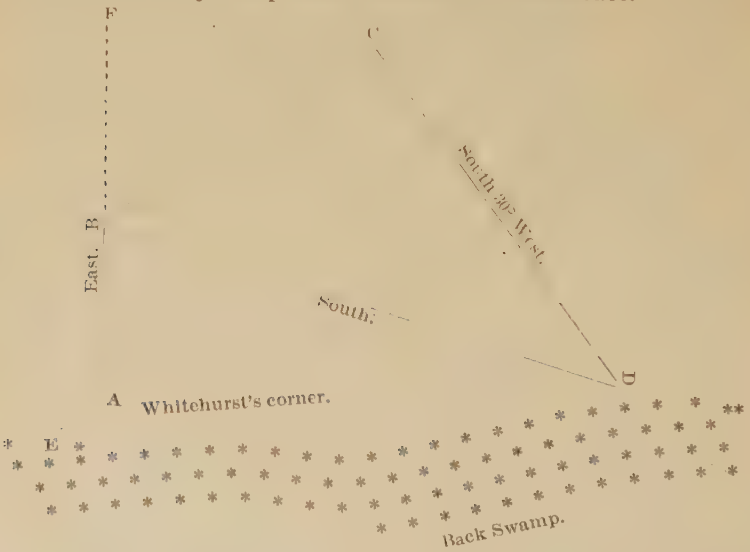
The Court will award a *venire facias de novo*, where the jury, in a special verdict, find the evidence and not facts.

The rules which have been established by the decisions of the Courts, for settling questions relative to the boundary of lands, have grown out of the peculiar situation and circumstances of the country: and have been moulded to meet the exigencies of men, and the demands of justice. These rules are:

1. That whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for, it may be; or however short or beyond the distance specified.
2. Whenever it can be proved that there was a line actually run by the Surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.
3. When the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance: Provided those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary.
4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for; in all such cases, we are of necessity confined to the courses and distances described in the patent or deed: for however fallacious such guides may be, there are none other left for the location.

In this case the jury found a special verdict, so much of which as relates to the point which was sent up for the opinion of this Court, was as follows:

"Hislop's patent calls for Whitehurst's corner, described in the plat of survey as A, and *thence along Ward's line 80 poles.*" Ward's line is from C to D. "Thence south on his line 320 poles to the back swamp." The line from (83) C to D is south 30° west; and is on the back swamp, and is the corner of Ward's patent, which covers the land to the east of the line from C to D. If the poles from Whitehurst's corner at A be run east, the course and distance will lead to B: and the south course called for in the patent from the termination of this line, will lead to D. If the east course called for in the patent, from Whitehurst's corner at A be continued, it will lead to F. and not touch Ward's line. If the Court be of opinion that the line from Whitehurst's corner at A, should be continued east 80 poles, and *thence* to Ward's line in the course nearest the description in the patent; or that it should run directly to Ward's line along the course nearest to that called for in the patent, the Jury find for the plaintiff, and assess his damages to $345. But if the Court be of opinion that the line from Whitehurst's corner at A, should run east 80 poles, and *thence south*, though not on or with Ward's line, the jury find for the Defendant. It does not appear that Ward had any lands, except those covered by the patent referred to in this case.



TAYLOR, Chief-Justice.—The land claimed by the (84) Plaintiff under Hislop's patent, is described by the letters A, B, C, D, and E. "Beginning at Whitehurst's corner at the letter A; thence east along Ward's line 80 poles, thence south on his line 320 poles to the back swamp." If the lines first called for, be extended according to the course and distance in the patent, they would run from A to B, and thence to D, and leave out the land claimed by the Plaintiff; but in so running, they would not be on or with Ward's line; they would depart from the boundaries called for in the patent, for the sake of preserving the course and distance. If the course of the first line, viz, east, be pursued, it will lead to F, and will not strike Ward's line, which is intersected by running a course south 50° east, at the letter C: and the question is, whether after running the first line 80 poles, east, it shall diverge in the course nearest to that called for, for the purpose of meeting Ward's line, and "of running on it" 320 poles to the back swamp, although the course of Ward's line is south 30° west, instead of south, as in the patent.

The decisions which have taken place in this State on questions of boundary, have grown out of the peculiar situation and circumstances of the country, and have, beyond the memory of any person now alive, been moulded to meet the exigencies of men and demands of justice, where the mode of appropriating an almost uninhabitable forest, had involved land titles in extreme confusion and uncertainty. In many cases, surveys were no otherwise made than upon paper; and in many others, when an actual survey was made, the purchasers from the Lords Proprietors were in danger of losing their lands by an inaccurate description of them, the omission of whole lines, and the mistake of courses. Land appropriated by a general description of courses and distances, without natural boundaries or marked lines, cannot be identified after the lapse of a considerable interval of time. If a beginning tree only were marked, the property continually revolves around it, and never can be (85) ascertained for no person can pronounce what course must now be run in order to ascertain a line, said to be run in a certain direction an hundred years ago, from the uncertainty in the variation of the compass, and from carelessness or the want of skill in measurement. It is easy to conceive, therefore, how utterly impossible it would have been, to render anything like justice to claimants under old patents, if the lands described in them were to be allotted only according to the courses and distances, to the neglect of natural boundaries, marked lines, and the well established lines and corners of adjoining tracts. Hence, certain rules have been laid down and repeatedly sanctioned by adjudications, which, in their application, have been found effectual for the just determination of almost every case that has arisen, and which have been considered for so great a length of time as part of the law of the country, that they ought not to be abrogated by any power short of that of the Legislature. These rules are,

1. That whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect, from any one of the numerous causes likely to generate error on such a subject; but a natural boundary is fixed and permanent, and its being called for in the deed or patent, marks beyond controversy, the intention of the party to select that land from the unappropriated mass. In confirmation of this rule, many cases have been decided, only a few of which have been reported; but as some of them are fully up to the rule, and have been uniformly acquiesced in, it may be useful to bring forward the principal features of them.

In Sandifer *v.* Foster, 1 Hayw. 237, Gee's patent began on the mouth of a dividing run, thence north, thence east, thence south to a white oak, thence along the river to the beginning. This white oak stood half a mile from the river, and if the line were run thence to the beginning, a large part of the land described in the Plaintiff's grant would be left out of Gee's patent. (Diagram 1.) It was decided that the river must be considered the boundary of Gee's patent.

In Pollock *v.* Harris, 1 Hayw. 254, a swamp, a pocosin and a marsh, are severally called for in the patent, as the termination of lines, which if run according to the courses and distances did not extend to them. The natural boundaries were held by the Court to be the proper terminations of the lines. To these cases may be added Witherspoon and Wife *v.* Black, Id. 496; Hammond *v.* McGlaughon, and Swaine *v.* Bell Bethune, 2 Id. 67, 139.

2. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accord-

ingly, notwithstanding a mistaken description of the land in the patent or deed.

I understand the first decision of Bradford *v* Hill, 1 Hayw. 22, to be an authority for this rule; for although the Court directed the Jury to find according to the courses and distances called for in the deed, it was in the absence of proofs tending to establish the old marked line leading from Pollock's to Bryant's corner. The boundaries in the patent were, "beginning on Fishing Creek, thence east 320 poles to Pollock's corner, thence north the same number of poles to Bryant's, thence along Bryant's lines west 320 poles to the Creek" —Bryant's corner being four degrees to the east of north from Pollock's corner, the line from Pollock's corner intersected Bryant's line considerably to the west of Bryant's corner. It was proved that there was an old marked line leading from Pollock's to Bryant's corner, but that in running by the compass north 54° east, which was the general course of that line, it would be sometimes on the one side and sometimes on the other of that run by the compass, *whence it was taken by the Jury to have been run by some person after the survey.* The triangle formed by the said north line, part
(87) of Bryant's line and a line from Pollock's corner to Bryant's corner, included the land in dispute. It was decided by the Court that the courses and distances in the deed must be adhered to, because the line from Pollock's to Bryant's corner, was not proved to have been run by the surveyor; but that in cases of evident mistake by the surveyor, parol evidence was admissible, though it ought to be admitted with caution.

The same case under the name of Burton *v.* Christie (Diagram 2, Taylor 118), came on for trial before Judge Moore, when the only additional fact proved was, that some ancient deeds were bounded by the old marked line from Pollock's to Bryant's corner. The Judge directed the Jury to establish that line, if they believed that to be the one intended.

In Eaton *v.* Person, the deed called for a course and distance, which carried the second line through the body of the land, leaving out a triangular piece, included in the second and third lines really run; but the second and third lines really run, as well as the corners, were marked and proved, by persons present at the survey for the patentee; upon which evidence the claimant under the patentee recovered. Diagram 3. 1 Hayw. 22.

In Person *v.* Roundtree, 1 Hayw. 378, the latter entered a tract of land, lying in Granville County, upon Shocco Creek, which was run out, "beginning at a tree on the bank of Shocco Creek, running south a certain number of poles to a corner, thence north a certain number of poles to a corner on the creek, thence up the creek to the beginning." By a mistake, either in the surveyor or secretary who filled up the grant, the courses were reversed, placing the land on the opposite side of the creek to that on which it was really surveyed, *so that the grant did not cover any of the land surveyed.*—Roundtree settled on the land surveyed, which was afterwards entered by a person, who obtained a deed from Lord Granville, and brought an ejectment against Roundtree, who proved the lines of the survey and a possession under his grant. The Court decided that Roundtree was entitled (88) to the land intended to be granted, and which was surveyed; and that he should not be prejudiced by the mistake of the surveyor or secretary.

It was decided by Judge Haywood, in the case of *Beatty*, that if a course and distance be called for, and there be a marked line and corner, variant from the course, which is proved to be the line made by the surveyor as a boundary, that marked line shall be preserved. 1 Hayw. 376.

In Stanton *v.* Bains (Diagram 4, 1 Hayw. 283), the Plaintiff claimed under Askill, who patented a tract of land in 1740, extending, as he alleged, to a line distinguished in the plat by the name of the dotted line. The courses and distances expressed in the patent, extended not so far, but only to a line distinguished in the plat as the black line. The Defendant entered this intermediate tract in the year 1784, and took possession; whereupon the Plaintiff brought suit. The Court permitted evidence to be given, that the dotted line, which was a marked one, had, for a long time, since the year 1740, been reputed the line of Askill's tract. The patent called for a gum standing in Roberts' line; this gum was found at the termination of the dotted line. It next called for two lines of Roberts' tract; the dotted line was upon these two lines. It called for Hoskins' corner; the dotted line went to that corner; and there was nothing in favor of the black line, but course and distance. But there was no witness who could prove positively that the dotted line was the line of Askill's tract

In Blount *v.* Benbury, Judge Hall says, there have been many decisions in this country which warrant a departure from the line described in the deed or patent, to follow a marked line, which the Jury have good reason to believe was the true one. 2 Hayw. 354.

The circumstances of that case, of which I have a fuller note than any published, afford a striking confirmation of the rule. The question arose on the title of a piece of land, which lay between two parallel lines, A B and C D. (89) The latter line was contended for by the Defendant as the line of J. Blount's patent; in which case, the Defendant was not in the possession of the Plaintiff's land; but if the line A B was the line of J. Blount's patent, the Defendant was in possession. The patent under which the Defendant claimed, called for Beasley's line and Blount's line at E, south 85° east, as one of the boundaries. The person under whom the Defendant claimed, in his deed dated in 1785, called for Blount's line, and at the same time, marked as such, the line from C to D. The principal question was, whether the line thus marked should be the boundary of the deed, or whether Blount's, wherever that should be ascertained to be, should be so considered. It is to be remembered, that the line from A to B was an old marked line. It was decided by the Court that Blount's line, wherever it was, should be the boundary; that although the patent calls for Beasley's line and Blount's line south 85° east for one boundary; still the jury might consider Beasley's line the boundary as far as it went, and then the line A B which was 51 poles to the north of it; and that line was consequently established. Diagram 5.

In Johnson *v.* House (2 Hayw. 301), Person surveyed the land for the patentee, under whom House claimed, and extended the line in question 160 poles, and marked and cornered it, as also the next line; but upon calculation, he found he had included 712 acres, instead of 640, and he cut off the land in question by drawing from 80 poles instead of 160. But he returned a plat to the Secretary's office, mentioning the corner red oak, marked at the end of 160 poles, and the corner white oak, marked at the end of the next line drawn from thence. The plat having been returned with those corners, although mentioned to stand at the distance of 80 poles instead of 160, they were taken, notwithstanding the distance mentioned in the plat, to the (90) true corners. The corner marked at the end of 80 poles, was a white oak instead of a red oak, called for in the patent.

These cases, and many others which have occurred since, sufficiently prove the existence of the rule, which, if it had not been adhered to, would, in every case cited, have deprived the true owner of part, or the whole of his land.

3. Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance, provided those lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary.

This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made; and calling for a well known line of another tract, denotes the intention of the party, with equal strength, to calling for a natural boundary, so long as that line can be proved.

In Miller v. White (2 Hayw. 160), the Plaintiff claimed under a patent to Nathan Bryan, beginning at a corner tree, thence south 80° east 40 poles, to Walter Lane's line. There was no actual survey; the 40 poles were completed before arriving at Lane's line. The second line was with Lane's line to his corner, a certain course and distance; but that distance would not reach the corner. Supposing the line to be drawn from the point of intersection of the first line with Lane's line, if the first line extended to Lane's line, and if the second line went with Lane's to his corner, then the land claimed by the Plaintiff was within Bryant's grant. If the first line stopt at the end of 40 poles, the land in question was not included. Judge Johnson was of opinion that the line should extend to Lane's line.

In Smith v. Murphy (2 Hayw. 183; Tayl 301) the Defendant produced in evidence two deeds: the third course of the latter deed called for 42 poles to a corner standing (91) on the other tract. Forty-two poles were completed before arriving at the first tract. If the last line of the second tract should be drawn from the point where the 42 poles were completed, the land which the Plaintiff had obtained a grant for, was not within any of the Defendant's deeds; but if the line be extended beyond the 42 poles to an intersection with the lines of the other tract, then the land claimed by the Plaintiff was covered by the Defendant's second deed. It was held by the Court that the line should be extended to that of the other tract.

4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood can be ascertained and identified by evidence, or where no lines or corners of an adjacent tract are called for, in all such cases, we are, of necessity, confined to the courses and distances described in the patent or deed; for, however fallacious such guides may be, there are none others left for the location.

A case recently decided may seem, upon a hasty glance, to limit the application of the third rule, and in some degree to shake its authority; but an accurate attention to the circumstances of that case, will show that the decision and the rule accord with each other. The words of the Plaintiff's patent were, "Beginning at a pine in or near his own line, and runs south 240 poles to a stake in William Hooks' line, thence with or near his line, north 73° east, 400 poles to a stake, thence north 305 poles to a pine, thence to the beginning." Hooks had three lines in the direction of the first line of the Plaintiff's patent, the two first of which formed an acute angle, and the corner of a patent which was ten years older than the Plaintiff's; the third line of Hooks' formed one side of a patent which was seven years younger than the plaintiff's. The question in the case was, whether Hooks's line which first presented itself as one side of the angle, that which formed the other side of the angle, or the still more distant line of the new patent, should form the *terminus ad quem* of the Plaintiff's patent. The claim (92) of the last line was rejected without hesitation, because, being made several years after the Paintiff's location, it could not have been called for in the survey, although there was evidence of Plaintiff's declarations that the patent was not surveyed 'till after the grant issued. The Court decided in favor of the first line, as the establishment of that formed the least departure from the words of the patent, and as the course from that line was north 73° east, as called for in the Plaintiff's patent; and would also run with or near Hooks' line, which would not be the case, if the first line of the Plaintiff's patent were extended to Hooks' second or third line. Upon this case it is to be observed, that it is an express authority to shew that where the line of another tract is called for, the line calling for it shall be extended thither, and in the terms of the rule, with no greater departure from the words of the patent than is necessary to satisfy them. The words of the plaintiff's patent were satisfied by stopping at the first line, and would have been departed from, if the line had been extended to the second. It was also a part of the case, that no actual survey of the Plaintiff's land had been made till after the patent issued. 1 N. C. Term Rep. 1.

It may also be thought that the second rule and the cases which support it, are broken in upon by the late decisions in Herring *v.* Wigg's (*Id.* 34); but such an inference is not authorised by the very peculiar circumstances of that case. Michael Herring was the owner of a patent covering the whole land in dispute; and in 1778, conveyed to Keetley, under whom the Defendant claimed, "beginning at a pine tree of Jacob Herring's and George Graham's land, and running with George Graham's line, and the same course continued to a corner, including 100 acres of land, running a north course to the patent line." Twenty-seven years afterwards, Michael Herring conveyed to his son the Plaintiff, by deed, which after describing several lines, called for "Richard Keetley's corner, a pine, thence with Rutley's (93) line south 98 poles to a pine, standing by the side of Graddy Herring's fence." The Plaintiff proposed to prove by parol evidence that a marked line from L to K was the true line of the Keetley deed; and he did prove that at the time of the conveyance to him (the Plaintiff) Michael Herring and himself actually ran to K, and thence to L, where there had stood the pine by Graddy Herring's fence; and that Keetley had sent his son to shew this line. The Court were of opinion, that no parol evidence was admissible to show a line in contradiction to the deed, which would give less than 100 acres; that as Keetley's corner was admitted to be at U, a line running thence could not alter the location, which was fixed by a prior deed from Michael Herring, to which, permanency was affixed by registration; that as to the line in question, the deed did not purport to be bounded by a tree or a stake, but was to be run in such a way as to include quantity. It was, therefore, a boundary, which could not be mistaken, altered, or changed by memory or reputation, but would always speak in the same tone of decisive notoriety. With respect to the circumstances of the land's being run off before Michael Herring executed the deed to the plaintiff, of the conduct of Keetley in recognizing the line K L as the true one, they were held not to affect Keetley's right, or to change that which was originally made the dividing line by the deed from Herring to Keetley.

This case does not affect the general rule; because the question in it was not where Keetley's line was originally fixed, but whether, when the survey was made and the lines established so as to include 100 acres, the posterior circumstances should have the effect of changing the line, so as to include a less quantity.

The right of the case before us depends upon the application of the third rule. The patent calls for Whitehurst's corner, which is ascertained to be at the letter A, and this is sufficient authority for running the course and distance of the next line from it, notwithstanding the unac-
(94) countable insertion of the words "along Ward's line." After running out the 80 poles, the words are "thence south on Ward's line 320 poles to the Back Swamp." Here we are presented with a choice of difficulties. If we run according to the course, we reach the Back swamp, but we do not run on Wards line. On the other hand if we continue the first line in an eastern course beyond the 80 poles, Ward's line will never be touched. It is, therefore, less a question of construction respecting the patent than of fact to be ascertained upon evidence to the jury, whether the line described as *Ward's* was the line originally called for, and according to which the land was located; and if Ward's line be established by proof, whether the second line in Hislop's patent was run from B to C, or from B to D. I am of opinion these facts ought to be enquired into by the Jury; for which purpose there must be a new trial.

DIAGRAMS REFERRED TO IN THE FOREGOING OPINION.

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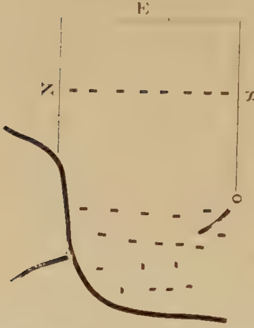

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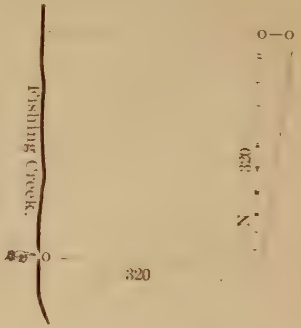

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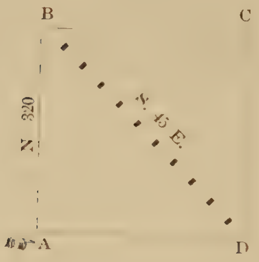

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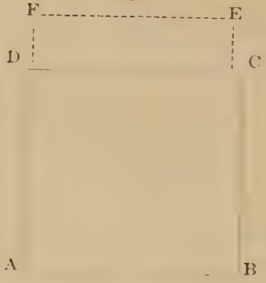

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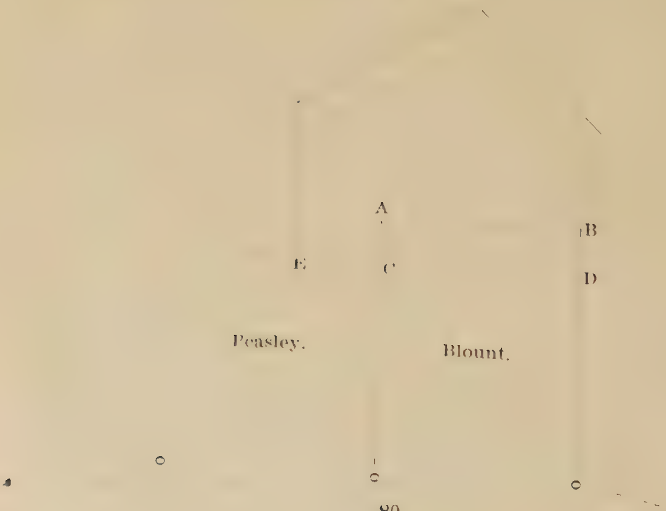

HENDERSON, Judge.—I think a *venire facias de novo*, should be awarded, because the Jury, instead of finding the facts have only found the evidence. That the line C D is Ward's line or a line of a tract of land belonging to Ward, is matter of *evidence*. That it is the line of Ward called for in Hislop's patent, is a question of *fact*, for the Jury to (96) find from the evidence: and this fact may depend upon a variety of circumstances, all proper for the consideration of a Jury. This error has become too common from confounding the evidence with the facts. A line, when once established to be the one called for, no matter by what evidence (if it be legal evidence,) whether it be artificial or natural, will certainly control course and distance, as the more certain description. A natural boundary, such as water course, is designated from other water courses by its name, or by its situation, or by some other mark. One of those means of identifying the water course cannot control all the rest, if those other means are more strong and certain. A name, for instance, is the most common means of designating it; and this in general is sufficiently certain: but it cannot control every other description; and where there are two descriptions incompatible with each other, that which is the most certain must prevail. Cases might be put, where it must be evident that the parties were mistaken in the name, and therefore the name must yield to some other description more consistent with the apparent intent of the parties. It is true, that in cases of water courses or other natural boundaries, and in some cases of artificial boundaries, which are of much notoriety, and have therefore obtained well known names, the other descriptions must be very strong: but if they be sufficiently so, the name must give way, and be accounted for from the misapprehension or mistake of the parties. This doctrine was fully illustrated in the famous suit relative to the *Cattail branch*, between Bullock's heirs and Littlejohn, which was more than once in this Court, and finally decided on the Circuit, to the entire satisfaction of the bench and the bar. Hislop's patent begins "at *A*, Whitehurst's corner, thence along Ward's line east 80 poles, thence south *on his line* 320 poles, to the Back swamp." Ward's line mentioned in the case, is almost 240 poles from Whitehurst's corner, running in a southwestern direction, and would not be intersected by an east (97) line from the beginning; and is the boundary of a tract of land of Ward's lying entirely east of that line. Of course it cannot be the line of Ward called for from A to B, or the first course in the patent. It is therefore almost certain, that it is not "the Ward's line" called for in the record course of the patent, and therefore would not control the course and distance, which is from A to B, and from B to D; leaving out the triangle B, C, D. But this is a question of fact, and the evidence should have been submitted to the Jury.

I presume the Chief Justice has correctly examined all the cases stated in his opinion; but I have not had an opportunity of looking into them; nor do I deem it necessary to do so, in order to illustrate my views of the points arising in this case—I am of opinion that there should be a new trial.

HALL, Judge—In this case I concur in the opinion delivered by Judge Henderson. I have not had time during the sitting of the Court to examine all the cases referred to in the opinion delivered by the Chief Justice: but I have no doubt they are truly and ably set forth and commented upon. But I think it is unnecessary to take any further view of the case than that taken by Judge Henderson—I concur in the opinion that there should be a new trial.

New trial granted.

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(98)

JOHN TAYLOR *v.* MARY LANIER AND OTHERS.

From Granville.

A father, for the purpose of advancing his son in life, conveys to him his manor plantation and sundry slaves, reserving to himself and wife the use of such lands and slaves during their joint lives and the life of the survivor of them; and in the conveyance "it is agreed between the father and son and is to be taken as a principal part of their contract, that the son is to provide for, maintain, keep, succour and nourish the father's daughter Mary, during her natural life, so that she do not suffer or lack for necessaries in any manner whatsoever."—The support and maintenance of Mary is not a charge *upon the property* conveyed to the son, but a personal charge upon the son.

There is no direction that the maintenance shall be raised out of the rents and profits of the property, nor any expression which takes the case out of the principles of an ordinary trust, binding only the conscience of the son.

A covenant before marriage to settle certain lands upon the wife, amounts to a specific lien upon those lands in the possession of the devisee; but a general covenant to settle lands upon the wife, of a certain annual value, gives no remedy to the wife but as a specialty creditor.

The father after making the conveyance aforesaid to his son, made his will and bequeathed to his daughter Mary, during her life "a bed and furniture, a horse, saddle and bridle, two negroes, &c. and directed that after her death, the property so bequeathed should be sold and the money be equally divided between testator's children, except the aforesaid son, and then notices that Mary is to have her maintenance from the son, according to the contract in the deed to him"—The property given to Mary in this bequest, is in addition to the maintenance provided for her in the deed to the son, and is not to be taken into account for her support and maintenance.

The rule of considering a legacy as satisfaction of a portion, arises from a presumption that it was so intended by the testator; and that like all other presumptions may be repelled or confirmed.

If portions be provided by any means whatsoever, and the parent gives a provision by will for a portion, it is a satisfaction *prima facie*, unless there be circumstances to shew it was not so intended.

This was a case agreed, in which the material facts were as follows.—Thomas Lanier, on the 2d November, 1790, executed to his son William Lanier a deed of gift, in the following words, to wit:

(199) *To all to whom these Presents shall come—Greeting—*

Know ye that I, Thomas Lanier, of Granville County, in the State of North Carolina, for and in consideration of the love, good will and affection, which I do owe and bear towards my son William Lanier, and for his advancement in life, do make over and convey and confirm unto the said William my manor plantation and houses, together with my lands adjacent, containing in the whole about nineteen hundred acres, be the same more or less, lying on Little Nut-Bush in the said County; also eleven negroes, viz: Jeffrey, Young, Jack, &c. saving and reserving nevertheless my life in and to the said land negroes, to use, occupy, possess and enjoy the free use, and exercise thereof, for and during the said term of my natural life, and also reserving to my wife Judith during her natural life, free and clear of interruption, the following part and parcel of the before mentioned land and houses, viz: beginning, &c. which said land and negroes I do hereby give and make over to my said son Willian Lanier, his heirs and assigns forever; but to remain and be agreeable to the true intent and meaning herein set forth. And it is further concluded and agreed upon between the said Thomas Lanier and his son William, and is to be considered as a principal part of this contract, that the said William provide for, maintain, keep, succour and nourish my daughter Mary during her natural life, so that she do not suffer or lack for the necessaries of life in any manner whatsoever. In testimony, &c. THOMAS LANIER, (Seal.)

Witness, &c.

Thomas Lanier delivered to his son William the negro slaves and part of the land shortly after the execution of this deed, and several years before his death; and during this time no claim for the support and maintenance of his daughter Mary, was set up against William. Thomas Lanier by his last will bequeathed as follows, to wit: "I lend unto my daughter Mary Lanier, for and during her natural life, one feather bed and furniture, that which she sleeps on, also a good riding horse, and a negro woman by the name of Lucy and her increase; and a negro fellow by the name of Burges, one saddle and bridle, the negro Burges to be hired out every year during her life: also two cows and calves, &c. After her decease, all that I have lent her, to be sold by my executors, and the money arising therefrom to be equally divided between my surviving children now living, except my son William, who is not to have any (100) part whatever of what I lend to my daughter Mary. And my daughter Mary is to have her maintenance from my son William according to contract made in my deed heretofore to him." The complainant and six of the Defendants were purchasers with notice.

Two questions were made in this case, 1st, whether the support and maintenance of Mary Lanier, be a charge upon the property conveyed by Thomas Lanier to William, or be only a personal charge upon William. 2d, whether the property bequeathed to Mary be subject to be taken into account for her support and maintenance, in aid of the property mentioned in the deed to William.

This case, which, from various causes, had been continued in this Court since July, 1812, was decided at this term.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The deed executed by Thomas Lanier, to his son William, purports to be made in consideration of natural love and affection, and for his advancement in life: and after describing the property, and reserving a life estate to himself in the land and negroes, and a life estate to his wife in part of the land, these words follow, "but to remain and be agreeable to the true intent and meaning herein set forth: and it is further concluded and agreed upon between the said Thomas and his son William, and is to be considered as a principal part of this contract, that the said William provide for, maintain, keep, succour and nourish, my daughter Mary, during her natural life, so that she do not suffer or lack for the necessaries of life, in any manner whatsoever." The words first quoted, are evidently referable to the life estates reserved to the grantor and his wife: and the question is, whether the other words making a provision for the daughter

Mary, operate as a specific lien upon the property, (101) so as to make it chargeable in the hands of *bona fide* purchasers, but with notice. And I am of opinion, that this is only a personal charge upon the son; for besides that there are no words which can be fairly construed as amounting to a lien, it is improbable that the covenantor should have designed so small a sum in proportion as was necessary to the maintenance of his daughter, to become a lien upon the whole of this property in the hands of a purchaser. The supposition seems to be inconsistent with what he professed to be the consideration, viz, the advancement of the son, and with the absolute control of the property, which is given to the son by the deed. There is no direction that the maintenance shall be raised out of the rents and profits of the property, nor any expression which takes the case out of the principles of an ordinary trust, binding only on the conscience of the son. I have looked into the cases of covenants which have been contended in this Court to run with the land, and find many much stronger than this, where the covenant was held to be merely personal. A covenant before marriage to settle certain lands upon the wife, amounts to a specific lien upon the land in the possession of the devisees: but a general covenant to settle lands upon the wife, of a certain annual value, gives no remedy to the wife, but as a specialty creditor. 1 P. Wms. 429. If A. covenant to pay an annuity to J. S. he shall not deduct for taxes, for the charge is only on the person of the covenantor. 2 Salk. 616. This case cannot be distinguished from the grant of an annuity which may be chargeable upon lands, if such a provision is made in the deed, but is in all other cases, only a personal charge. If A. devise land to B. on condition to pay C. a sum of money, and there be no clause of entry, this is no charge on the estate to give the legatee of the money a lien on the land; but the heir at law may enter and take advantage of the condition; but in Equity he is considered only as a trustee for the legatee. 1 Ves. 423.

With respect to the other question in this case, I (102) take it to be very clear, on the ground of intention, that the bequests made to the daughter Mary are in addition to the maintenance provided for in the deed; because the testator takes notice that she is to have maintenance from his son, according to their contract; and this he does immediately after disposing of Mary's legacy after her death.

This completely negatives every presumption of his having forgotten the provision for maintenance; and is nearly as strong as if he had expressly declared that the bequest should be additional to it. It also affords an answer to all the cases on the subject of double portions; for on the supposition that they were applicable to this case, yet it is admitted by them that the rule of considering a legacy as satisfaction of a portion, arises from a presumption that it was so intended by the testator; and that, like all other presumptions, may be repelled or confirmed. The rule, as laid down in one of the latest cases, is, that if portions are provided by any means whatsoever, and the patent gives a provision by will for a portion, it is a satisfaction *prima facie*, unless there be circumstances to show it was not so intended. 3 Ves. 516. Here, I think, the strongest circumstance appears upon the face of the will; and, consequently, that nothing ought to be deducted from the burthen placed upon William, of maintaining his sister Mary by reason of the bequest; which ought to be considered as an added bounty of the testator, designed to place within her reach certain moderate enjoyments beyond the limits of a bare maintenance.

(103)

JAMES M. BURTON *v.* JESSE DICKENS.

From Person.

A debtor imprisoned upon a *ca. sa.* surrenders his estate for the benefit of his creditors, and takes the oath of insolvency, agreeable to the provisions of the act of 1773, ch. 4, whereupon he is discharged: This discharge protects him from arrest at the suit of any other creditor, to whom he was indebted at the time.

He is thus protectected, not by any provision of the act of 1773, but by the 39th section of the Constitution of this State, which declares that the "person of a debtor, where there is not a strong presumption of fraud, shall not be confined in prison after delivering up, *bona fide*, all his estate real and personal, for the use of his creditors, in such manner as shall hereafter be regulated by law."

The act of 1778, ch. 5, enforced all such acts of the General Assembly as were in use and in force before the adoption of the Constitution, which were not inconsistent with that instrument. That act enforced the act of 1773, ch. 4, so far as the same provides for the discharge of insolvent debtors; and so much of the act of 1773, ch. 4, as left the debtor subject to the arrest of a creditor at whose suit he was not confined previous to his discharge, is annulled by the 39th section of the Constitution.

To entitle the debtor to this protection, he must deliver up, *bona fide*, all his estate real and personal for the use of his creditors—And it would seem not to be material whether he took the oath of insolvency in the Court in which he filed his petition, or in some other Court, if he give notice to the creditor at whose instance he is imprisoned. Notice to other creditors is not necessary, although the effect of his discharge as to them, will be a protection from arrest at their suit.

When the debtor delivers up his estate for the use of his creditors, and Commissioners are appointed, who give notice to the creditors to come in and receive their dividends, each creditor has an election to come in or not. If he come in and receive his dividend, his debt is satisfied: If he do not, he may sue out execution against such property as the debtor may thereafter acquire.

This was an application for a writ of *supersedeas;* and was founded upon an affidavit made by James M. Burton, setting forth that in the year one thousand eight hundred and six, Philips Moore, executor of the last will of Stephen Moore, deceased, sued out against him a writ of *capias ad satisfaciendum* upon a judgment recovered in Person Court; upon which writ he was arrested by the Sheriff of Granville county, and confined in the common jail of that county. That, (101) wishing to avail himself of the benefit of the act of the General Assembly passed for the relief of insolvent debtors, he filed his petition in the Court for Person county, and annexed thereto a schedule of his estate, agreeably to the provisions of the act of 1773, ch. 4. That a copy of this petition and schedule were issued and delivered to the Plaintiff in execution, at whose instance he was confined. That Jesse Dickens, previous to the said arrest and imprisonment, had recovered a judgment against him in Person County Court, and that he gave notice to Dickens of his imprisonment, and of his intention to take the benefit of the act passed for the relief of insolvent debtors; that in the year 1806, in Granville Court, he, agreeably to the notices which had been served upon his creditors, took the oath of insolvency, and was discharged; that he was advised his person was thereby protected from arrest at the suit of any creditor to whom he was at that time indebted; and that Jesse Dickens, having revived his judgment aforesaid, had sued out against him a writ of *capias ad satisfaciendum*, and delivered it to the Sheriff of Orange county, in which county he then resided. He prayed for a writ of *supersedeas*, which was granted by his honor the Chief Justice; which writ was made returnable to the Superior Court of Law for Person county; and the question arising in this case being one of great consequence to the personal liberty of the citizen, it was sent to this Court for the opinion of the Judges.

TAYLOR, Chief Justice.—The *supersedeas* was granted by me in this case, from doubts which I entertained respecting the true construction of the act of 1773 for the relief of insolvent debtors; thinking it better that a question concerning the liberty of a citizen should be deliberately settled, though at the expense of delay to a creditor, than that an unfortunate debtor, who had surrendered all his substance, should, by a life of imprisonment, be prevented from acquir- (105) ing more, under the force of expressions not in themselves clear and satisfactory. I cannot, however, discover, in the act, considered alone, any sufficient ground upon which he is entitled to a discharge: and were there no other source of relief, I fear the *supersedeas* would be discharged. It is evident from every part of the first branch of the act, that notice need only be given to the creditors at whose instance the party is imprisoned, and that the discharge only operates against their claims; the words being "and shall stand forever discharged of all such debts so sued for," that is, in reference to the preceding expressions "taken or charged on mesne process or execution for any debt:" so that although a suit be instituted, yet unless the debtor be charged in execution on such suit, the discharge as to that creditor operates nothing. The words of the second branch are also "taken or charged on mesne process or execution," and the notice is to be given "to the creditor or creditors at whose suit the prisoner is confined." The seventh section directs that the person of the debtor so discharged shall never be arrested for the same debt. The eighth section, in providing for giving notice where the creditor lives out of the state, employs the same limited expressions "of creditors at whose suit the debtor is charged:"—But the doubt arose from the sixth clause, which directs the commissioners to examine into the claims of all the creditors, as well as those at whose suit the commitment has taken place, as of all other; and provides for a distribution amongst all the creditors appearing, in proportion to their demands.

It seems at first view entirely unjust that where the property was surrendered for the benefit of all the creditors, any of them should be allowed afterwards to charge the debtor in execution, supposing every thing to have been fairly transacted on his part; and it was supposed the act intended to

operate like a bankrupt law, where, after a fair sur-
(106) render, the debtor is discharged as to all creditors.
A closer examination of the law shews that it designed only to discharge the debtor in those cases where the creditor appeared and availed himself of the notice to receive a dividend of the property; for the seventh clause provides "that the person of such debtor so discharged shall never be arrested for the same debt," that is, the debt described in the sixth clause, where the creditor appears and receives a part of the distribution. A creditor who has sued, but has not charged the debtor in execution, is not entitled to any notice previously to the oath being administered to the insolvent; and if neglecting the notice given by the commissioners to exhibit his claim, he does not come in and accept a dividend, there seems to be nothing in the act to restrain him from suing out a *ca. sa.* thereafter.

Upon examining the insolvent law of 1749, I perceive that the assignment of the property was made only for the benefit of the creditors at whose suit the debtor was imprisoned, and none other creditors were required to be summoned, nor was the person of the debtor discharged as to any other, (Swans. Coll. Sect. 4, 5, 7), which act pursued in that respect the terms of an insolvent law passed in England a few years before. The act under consideration proceeds a step further, and allows all the creditors to take benefit from the surrender; but if they elect to renounce this benefit and proceed with their suits, they are at liberty to do so.

Thus the case would stand under the act of 1773, and the effect might be, that all the creditors in succession, who did not choose to come in upon the dividend, might seize the person of the debtor, even after the fairest surrender of his property. But in 1776, the constitution provided (Sect. 39) "that the person of a debtor, where there is not a "strong presumption of fraud, shall not be confined in prison after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors, in such manner as shall
(107) hereafter be regulated by law." To give efficacy to
this provision, it was necessary that a future legislature should regulate the manner in which a debtor should surrender his property; but this might be done either by enacting a new law, or reinforcing an old one; and the latter method has been pursued. In 1778, all acts of assembly are put in force, which are not inconsistent with the freedom and

independence of the state, and with the new form of government; and I take it to be a necessary implication, such as are not likewise incompatible with the constitution then recently established. The consequence of this is, that the act of 1773, is in force so far as it regulates the surrender of the property and the discharge of the person; but is annulled so far as its construction tends to an unjust, unnecessary and cruel imprisonment of an honest but unfortunate debtor. This outrage on the rights of humanity, falls before the benign influence of a free constitution, and with other remnants of our colonial condition, is consigned to the oblivion it merits—The applicant is entitled to his discharge and to the Writ of Supersedeas which he prays for.

HALL, Judge.—The applicant in this case was imprisoned at the suit of Moore's executor: Dickens had obtained a judgment against him, but had not charged him in execution, before he surrendered his estate and took the oath of insolvency. Dickens, therefore, stood in the same situation with creditors who had not recovered judgments. In both clauses of the act of 1773, ch. 4, where the debtor is wholly insolvent, or intends to deliver up his effects to his creditors under a petition to Court, notice is directed to be given to the creditor at whose suit he is imprisoned; and this for the double purpose of enabling the creditor to appear and contest the fact of the debtor's insolvency, and shewing the amount of property he is entitled to, in case the debtor shall surrender his estate. No notice is directed to be given to creditors generally; they cannot be bound by a proceeding to which they are not parties. It might be their object to wait with (108) the debtor until his circumstances would grow better; and they ought not to be injured by others who might think proper to proceed against him. Dickens not having charged the debtor in execution, it was not necessary to give him notice; it was only necessary to give notice to the creditor at whose suit the debtor was confined. Where the oath of insolvency is taken, the insolvent is discharged from the debts sued for, and for which he was imprisoned. The act does not declare that he shall be discharged from any more; and where he surrenders his property, the act declares, "that the person of such debtor so discharged, shall never be arrested for the same debt; but the judgment shall be held to be fully satisfied"—This clearly means the debt for which he was imprisoned. It is true, after the debtor is discharged and Commissioners are appointed, the creditors generally are to be notified to come in: but nothing is said about their debts being discharged, after receiving their proportion of the money for which the debtor's property was sold: and if the case of the applicant depended altogether upon this act of the General Assembly, I should feel myself bound to give judgment against him. But the 39th section of the Constitution of this State declares, "that the person of a debtor, where there is not a strong presumption of fraud, shall not be confined in prison after delivering up, *bona fide*, all his estate real and personal, for the use of his creditors in such manner as shall hereafter be regulated by law." It is true, that since the adoption of the Constitution, no law has been passed by the Legislature on the subject; but by an act passed in the year 1778, ch. 5, the Legislature have enforced all the acts of Assembly in force before the adoption of the Constitution, provided they were not inconsistent with that instrument: and it is believed that the act of 1773, ch. 4, amongst others, was thereby enforced. It has certainly been in use: for debtors have not been released from imprisonment, otherwise than as pointed out in that act. The applicant, having delivered up his property for the use of (109) his creditors and taken the oath of insolvency, ought not to be confined under Dickens' execution. Let the *supersedeas* which has been granted in this case be continued.

(110)

The Executors of CHARLES JAMES *v.* WILLIAM B. MASTERS.

From Craven.

Testator bequeaths negro slaves to his wife during her life, and directs that after her death they shall be set free; and enjoins it as a duty upon his executors to use their best endeavors to procure from Court a license to emancipate them. He then gives several small legacies to his nieces, and concludes his will with a declaration "that no person or persons whatever, being in any degree related to him or his wife, or any other person or persons whatever, other than was therein before mentioned, should ever under pretence come in for a share, or receive any part of his estate." He appoints his wife and four other persons his executors: his wife holds the negroes during her life, and bequeaths them by her will to her niece, whose husband takes them into possession, claiming the absolute property in them. The surviving executors of the testator bring detinue for the negroes, and recover, because,

1. Although by the policy of our law, the ulterior limitation after the

wife's life estate is void, the entire interest in the negroes did not vest in her; she could not claim *under* the will and in *express opposition* to the will; and here there were express words of exclusion as to any other interest than one for life. And her interest as one of those among whom the residue of the estate undisposed of by the will was to be divided, was not such an interest before the assent of the executors, as vested a legal title in her legatee. As to the assent of the executors, it was in this, as in all other cases, co extensive with the legacy. Where there is no remainder, the assent enures to the benefit of the particular tenant only; and the executors are entitled to the possession of the chattel again, to perform the other trusts of their office.

2. The clause of the will excluding all persons from a beneficial interest in the negroes after the life estate of the wife, does not affect the interest of the Plaintiffs as executors or trustees, nor the interest arising from their office of executors, which is necessary to perform the trusts of the will or the trusts raised by law.

A legacy cannot be claimed *under* a will in express opposition to the plain intention of the testator. But the next of kin can take in express opposition to the words of the will; for they take under the law, and not under the will.

Charles James being possessed of sundry negro slaves, made and published his last will, and therein bequeathed to his wife Comfort James, all his estate during her (111) natural life; and after her death he directed all his negro slaves to be emancipated, declaring that he wished to give to them their freedom as a reward for their faithful and meritorious services; and he requested his executors to use their utmost endeavors with the County Court of Craven to obtain a license to emancipate them. He gave several small articles of his estate to his nieces, and declared, at the conclusion of his will, "that no person or persons whatever, being in any degree related to him or his wife, or any other person or persons whatever, other than was therein before mentioned, should ever, under any pretence, come in for a share or receive any part of his estate." He then appointed his wife and the plaintiffs in this suit his executors. Comfort James, the widow, with the assent of her co-executors, took the negro slaves into her possession as legatee, and kept them during her life. She died on the 6th day of January, 1816, having, by her last will, given and bequeathed all her property to Polly, the wife of the Defendant, whom she appointed her executrix. The defendant took the negroes into his possession, and thereupon the Plaintiffs, who are the surviving executors of Charles James, brought an action of detinue to recover them; and it was referred to this Court to decide whether they be entitled to recover.

Gaston, for the Defendant.—On the death of Charles James, the slaves became at law the property of the executors: They, however, took as mere trustees, and the enquiry is, for whom did they take, and upon what trusts? The will is explicit that the wife shall have them for her life, and after her death that they shall be free. The executors are not to be their owners; but their guardians, agents, and solicitors of their freedom. No other persons shall be their owners; they are to be free under the tutillage and the protection of their executors. This is forbidden by the policy of our laws, and the whole of this disposition after the wife's death, is ille- (112) gal and void. Haywood *v.* Craven's executor.

On what trusts then does the law say the executors take the legal estate? Equity follows the law and puts the same construction on trusts as on legal estates. Anciently, a bequest for life of a chattel interest amounted to so absolute a disposition as to invalidate any further limitation thereof after the legatee's death. Roll. Ab. 610. Bro. Ab. 235 Pl. 17. 1 Dyer 7. In a devise of the profits of a term to one for life, and after his decease to another, he in remainder assigned during the life of the first devisee, and the assignment was adjudged void, for that he had but a possibility. Cited in Fulwood's case, 4 Co. 66. A distinction was afterward's taken in favor of such an ulterior limitation, where the bequest for life had been of the *use* only, of the chattel. Ld. Hastings *v.* Douglas, Cro. Car. 346. It was afterwards held that where the chattel itself was given for life with a limitation over, in order to support the limitation the will should be construed as though the use only had been given in the first instance. Mathew Manning's case, 8 Co. Rep. 187. Lampet's case, 10 Id. 47. It would seem also that where a limitation has been made for life, of a chattel real, and no disposition thereof thereafter, it was held that a possibility of reverter was left in the executors of the testator (1 Salk. 231): for the law there, is, that all not given away by the will shall vest in the executor beneficially, unless an intent appear to exclude him. Wherever an intent to exclude him appears, he shall be barred from taking beneficially and be converted into a mere trustee. If an executor have a legacy and there be no next of kin, he shall be a trustee for the crown. Toller 270, 1 Bro. Ch. 211.

But a bequest of a chattel for life, or a day, or an hour, is still held to be a disposition of the whole interest therein, when the ulterior limitations are void, and it is the (113) testator's intention to dispose from his executors. 1 P. Wms. 660. 2 Fearne 276, 7–8,—374, 5–6, Cruise, (title Devise) ch. 11, 576, 7–8–9, Powell's Swinburn 1 vol. 258. 7 East. 269, 274. In the present case, the ulterior limitation being void, the whole beneficial interest in the slaves passed to the legatee for life, under whom the Defendant claims. Upon the assent of the executors the whole beneficial interest given by the testator, is converted into a legal ownership. Plow. 549. 1 Stra. 70. 4 Co. 286. 3 East. 120.

HENDERSON, Judge, delivered the opinion of the Court.

The fundamental rule in the construction of wills is, that the intention of the testator, if not consistent with the law, shall prevail; and all artificial rules have that object in view; and all the cases cited by the Defendant's counsel and relied on in this case, are bottomed upon that rule. As where an estate is given to one for life, with a remainder that is void, and the executor is excluded, it raises a presumption that the legatee for life shall have the whole interest, because there is none other mentioned in the will to take, after the determination of the life estate. But I cannot imagine a case, where a legacy can be claimed *under* a will, in express opposition to the plain intention of the testator. It is a contradiction in terms. But there are many cases, where the next of kin take in express opposition to the words of a will; there they take as next of kin under the law, and not under the will. For the right of the next of kin is defeated only by a substitution of some person to take in their place, and not by a declaration that they shall not take. As if a man by his will were to declare, that his next of kin should have no part of his estate, and not direct who should take: the next of kin would take, not under the will, but under the law. The wife's claim in this case is *under* the will, that is, *that her life estate shall be extended into an absolute interest, because the ulterior limitations are void, and the executors are excluded;* which might raise a possible intent in her (114) favor, were it not that there are words in the will in express opposition to such claim. And although she will take part as one of the distributees, she will take nothing as legatee. Therefore she had nothing to bequeath to the defendant; for her interest, as one of those among whom the residue of the estate undisposed of by the will was to be divided, was not such an interest before the assent of the executors, as vested a legal title in her legatee.

Next, as to the right of the executors. Although all beneficial interest may be taken from them by the will, this does not affect their interest as executors or trustees, or that interest arising from their office of executors, which is necessary to perform the trusts of the will, or the trusts raised by law. They therefore are entitled to the possession of the negroes; nor will the assent given to the life estate, debar them from regaining the possession. An assent to a legacy passes an interest co-extensive with that legacy; and where there is a legacy to one for life or years, with a remainder, an assent to the legacy to the particular tenant, is an assent to the person in remainder, according to the English law; for they both, in law, constitute but one legacy. But where there is no remainder, the assent enures to the benefit of the particular tenant only; and the executor has a right to the possession of the chattel again, to perform the other trusts of his office. The doctrine is illustrated by the decision of this Court in the case of Dunwoodie's executors *v.* Carrington (Law Repos. 469), if it needed illustration.

In what manner the executors are to dispose of the property, is not, nor can it be brought before the Court in the present action, however much it may be desired by those interested in the question; they are not parties to this suit, and their rights cannot be adjudicated.

The Court are of opinion that the Plaintiffs are entitled to recover.

ALICE HAMILTON, EX'X OF FERDINAND HAMILTON *v.* JAMES SHEPPERD, ADM'R OLIVER SMITH.

From Wayne.

In an action on the case to recover damages for a fraud in the sale of a Land Warrant, the Defendant pleaded the statute of limitations; to which plea the Plaintiff replied specially, that the fraud was not discovered until within three years next before the bringing of the suit. Replication overruled and plea sustained.

The cause of action accrued when the fraud was committed; and three years having run from that time before the beginning of the suit, the Plaintiff is barred; for he is not within any of the savings of the statute.

The common saying, that the statue of limitations does not run where there is fraud of a trust, is founded in mistake. Where there is a pure trust, in which Equity exercises exclusive jurisdiction, or where there is a fraud, in which Equity exercises the like jurisdiction, the Court of Equity will permit, or not, at its discretion, lapse of time to bar an investigation. That Court is bound by no statute on the subject; for the *subject matter* is not one of the cases barred by the statute of limitations. It is a pure Equity, not within the letter or spirit of the statute. But if it were on a subject matter cognizable at law, and within the cases provided for in the statute, that statute is as positive a bar in a Court of Equity, as in a Court of Law. The maxim is, not that Equity respects time, but that Equity follows the Law.

This was an action on the case to recover damages for a fraud in the sale of a land warrant. The Plaintiff offered in evidence, a deed proved to have been executed by Smith, conveying to Ferdinand Hamilton "all his right, title and interest in a land warrant transferred to Nancy Shepperd, for 640 acres of land, No. 1751, which was supposed to be in the Secretary's office in the State of North-Carolina; which warrant was for lands on the Cumberland River, above the mouth of Roaring River:" This deed purported to convey the right of Smith and of Nancy Shepperd, whom he had married, and was dated 4th June, 1806. On this deed was endorsed a certificate of Registration in Jackson County, Tennessee; but there was no other evidence that the registration was an official act. The words and figures "640 acres, No. 1751," were interlined after the deed was (116) executed, and in the absence of Smith. To account for this interlineation, the Plaintiff produced a letter written by Smith to Hamilton, in which he informed Hamilton that the No. of the warrant sold to him was 1751, and that he might insert that No. in the deed. Other evidence was also offered shewing that Smith had sold a land warrant to Hamilton, and specially pointing out its location, which as described by him and in the deed, and in the note hereafter mentioned, would cover the land on which Hamilton lived. This note was given to Smith by Hamilton, to secure the residue of the purchase money, and was produced by the Defendant under a notice from the Plaintiff. In this note, the lands were described as lying "on Cumberland River, at the upper end of the "first bluff above the mouth of the first big Creek above the mouth of Roaring River"—and the warrant as being located on the 19th February, 1787.

The plaintiff then proved, that on the 24th January, 1786, the warrant No. 1751, was located on the east fork of Stone's River; and that after the marriage of Smith with Nancy Shepperd, a grant issued to her from the State of North-Carolina for these lands. That previously to the sale to Hamilton, to wit, on the 25th January, 1798, Smith and his wife sold the lands so granted to her to John Gray Blount. Their deed to Blount, the execution of which was proved on the trial, was acknowledged in Pitt County Court, by Smith, and the privy examination of his wife taken. There was also a certificate of the presiding Justice of the Court, that George Evans, who attested the probate, was Clerk of the Court. A certificate of registration in Sumner County, in Tennessee, was endorsed on the deed; but there was no other evidence that the registration in Tennessee was an official act. This suit was instituted in November, 1811; and it appeared that the Plaintiff had not discovered the alleged fraud until a year before the suit was brought. Smith died, and the administrator qualified more than two years before (117) the bringing of this suit.

The Defendant pleaded "the general issue, the act of 1789, and the statute of limitations."

On the first plea, it was insisted, 1st That Hamilton, by inserting the figures and word "640 acres" in Smith's deed, had so vitiated it that the Jury should not regard it, nor enquire whether such an insertion was made with a fraudulent intent or not; and of this opinion was the Judge before whom the case was tried: but he directed the Jury that if, from any other evidence in the case, it appeared satisfactorily to them that a sale had been made, they were at liberty to regard such evidence. 2d. That it did not judicially appear that the deed from Smith to Hamilton, and the deed from Smith and wife to Blount, had been registered. But no evidence was offered that by the laws of Tennessee, registration was necessary.

To support the plea of the act of 1789, the Defendant proved that Smith died in August, 1807, and that in the next month, the Defendant having taken out letters of administration on his estate, advertised at the court house and two other public places in the county where Smith had usually resided next before his death, for creditors to present their claims or that they would be barred. To this plea there was a replication; and the Judge instructed the Jury, that the defendant had done all that was required of him by the act of 1789, and that the Plaintiff was barred.

As to the plea of the statute of limitations, that the suit had not been brought within three years after the cause of action accrued, the Plaintiff replied specially, that the fraud was not discovered until ----, and that this suit was brought within three years after the discovery—and on this point the Judge instructed the Jury, that if they were satisfied of the facts, the replication was good.

The Jury found for the Plaintiff; and a new trial was moved for, 1st. Because the deeds did not judicially appear to have been registered. 2dly. Because the Jury found contrary to the charge of the Court upon the plea of (118) the act of 1789.

The motion for a new trial was sent to this Court; and

HENDERSON, Judge, delivered the opinion of the Court.

It is unnecessary to decide any other point in this case than the statute of limitations. More than three years had elapsed from the time the cause of action accrued, to the bringing of this suit, and the Plaintiff is not within any of the savings of the act. But he alleges, that this was a transaction founded in fraud, and that he brought the action within less than three years after he made the discovery. Were it not for the difficulty of ascertaining the fact, when the discovery was made, and we were now legislating on the subject instead of expounding the law, we might make such an exception. But it is not in the act, nor is there any thing like it; and we cannot put it there. It is neither in its letter nor spirit.

But it is said, the statute of limitations does not run where there is a fraud or trust. It is true, where there is a pure trust, in which case Equity has exclusive jurisdiction, also in cases where there is a fraud in which Equity has the like jurisdiction, the Court of Equity will permit or not, at its discretion, lapse of time to bar an investigation: but that Court is bound by no statute on the subject; for the *subject matter* is not one of the cases barred by the statute of limitations. It is a pure Equity, not within the letter or spirit of the act. It is neither an action on the case, nor any other action mentioned in the statute; nor does it embrace the subject matter of any such action. The Court is free, therefore, to exercise its discretion in the application of the maxim in Equity respecting time. But if it were on a subject matter cognizable at law, and within the cases provided for in the act of limitations, that act is as positive a bar in a Court of Equity, as in a Court of Law. For the maxim is not that Equity respects time, but that Equity follows the

law. It is from these rules in Equity that a com-
(119) mon saying has gone abroad, that the statute of limitations does not run where there is a trust or a fraud: and Judge Williams said it on the bench more than once. But it is very clear that it was a mistake. For except a case in Massachusetts, and a few *nisi prius* cases in this State, not a case can be found where such a rule is established; nor do I know how any should be expected. When the words of the act and of its savings are so explicit, we are not at liberty to travel out of them. The Court are therefore of opinion, that the rule for a new trial should be made absolute.

OWEN CLINTON *v.* NOAH MERCER.

From Robeson.

A agrees to deliver to B. certain specific articles by a particular day, for which B. agrees to pay him a certain price. A. neglects to deliver them, for which he is sued. Although upon the trial it do not appear that B. has sustained any actual damage, he is entitled to recover nominal damages.

For the breach of all valid contracts, when proved to the satisfaction of a Jury, the law requires damages to be assessed.

This was an action on the case, founded upon the undertaking of the Defendant to deliver to the Plaintiff five hundred tar barrels by a particular day. The Defendant pleaded, *non assumpsit;* and upon the trial, it appeared in evidence that the defendant, in the fall of the year 1715, agreed to deliver to the Plaintiff by the first day of March then next ensuing, five hundred tar barrels, for each of which the Plaintiff agreed to pay him, upon the delivery of the barrels, thirty-five cents. The Plaintiff had prepared several tar kilns ready for burning by the first of March, except as to the logging and turfing of them, which kilns would have yielded several hundred barrels of tar, but not as many as five hundred. The defendant failed to deliver the
(120) barrels, or any of them, by the first day of March, nor did he deliver them afterwards. The Plaintiff did not apply for them, nor offer to pay the Defendant for them, until some time in May following, when he went to the Defendant's house to demand the barrels, and the Defendant being from home, he informed the Defendant's wife that he had come to demand the barrels. The price of tar

during the month of March, was one dollar and forty cents per barrel: It soon afterwards fell to one dollar, and continued at that price for a considerable time. The Court instructed the Jury, that if they believed the Plaintiff had not sustained any damage by the failure of the Defendant to deliver the barrels by the first day of March, they might find a verdict for the Defendant. If they were of opinion that he had sustained any damage, they should find for the Plaintiff. The Jury found for the Defendant; and a rule was obtained to shew cause why a new trial should not be granted, on the ground of misdirection by the Court; which rule was sent to this Court and

TAYLOR, Chief Justice, delivered the opinion of the Court: For the breach of all valid contracts, when proved to the satisfaction of a Jury, the law requires damages to be assessed; which are greater or less, according to the injury sustained by the party. But whenever a non-performance is established, although no real loss be proved, nominal damages, at least, ought to be given. The Court cannot, therefore, approve of the instructions given by the Judge to the Jury, that if they believe the Plaintiff had not really sustained any damage by the failure on the part of the Defendant to deliver the barrels on the day, they might find a verdict for the Defendant. On the contrary, the Jury were bound to find a verdict for the Plaintiff upon a breach of the contract being established. The rule for a new trial must be made absolute.

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(121)

THE STATE *v.* JAMES BARROW.

From Pitt.

A man charged as putative father of a bastard child, is at liberty to shew that the mother of the child is of mixed blood, and within the fourth degree, and therefore excluded by the act of Assembly from swearing against him.

The County Court cannot charge a man with the maintenance of a bastard, where it appears to them, that the magistrates who took the examination of the woman, have proceeded against law, in the judgment they have formed.

Whenever a special power is given to a Justice of the Peace, by statute, to convict an offender in a summary way, without a trial by Jury, he must strictly pursue that power.

When a trial by Jury is dispensed with, the Justice must nevertheless observe the course of the common law in trials; he must give notice to the party of the charge raised against him, and give him an opportunity of making defence. The evidence against him must be such as the common law approves of, unless the statute specially directs otherwise.

The facts of this case are set forth in the opinion of the Court delivered by

TAYLOR, Chief Justice.—The Defendant was charged as putative father of a bastard child, and bound for his appearance at the County Court; where he moved for leave to plead, that the woman, who had charged him upon oath with being the father of the child, was of mixed blood, within the fourth degree, and that she ought not to swear against him.

The motion was overruled, and the defendant appealed to the Superior Court, and the motion has been sent here for our opinion.

The only purpose for which the party was bound over to the County Court under the act of 1741, was, that he might be charged with the maintenance of the child, as that Court might direct. But as this mode of proceeding was liable to abuse, and an innocent man might be made liable (122) conclusively by the oath of the woman, the act of 1814 entitled the party to have an issue made up, to try whether he be the father of the child; upon which issue, the examination of the woman, returned to Court, shall be *prima facie* evidence only, against the accused. If it be true, that this Defendant has been adjudged the father upon incompetent testimony, and he avail himself of the first opportunity he has, of making the objection known to the Court, it is right that he should be heard. If an issue were made up, and the fact alleged by him proved, the examination could not be read in evidence against him; and to such issue he is entitled by the act. To object to the testimony, is in effect, to apply for an issue; and is in substance, to deny that he has been properly adjudged to be the father; and to ask for a re-examination on that fact. But independently of the act of 1814, it is apprehended that the County Court cannot rightfully charge a person with the maintenance, if it appear to them that the magistrates have proceeded against law, in the judgment they have formed. Wherever a special power is given to a Justice of the Peace by a statute, to convict an offender in a summary manner, without a trial by jury, he must strictly pursue that power; otherwise the common law will break in upon him and level all his proceedings. When a trial by jury is dispensed with, he must nevertheless observe the course of the common law in trials, raise a charge, give notice to the party, and an opportunity to make his defence. The evidence against him must be such as the common law approves of, unless the statute specially directs otherwise. It is the opinion of the Court, that this case be remanded to the County Court, that an issue be made up under the act of 1814, and the Defendant be at liberty to allege and prove the incompetency of the witness.

(123)

THE STATE *v.* JOSHUA AMMONS.

From Wayne.

Indictment for perjury charged that at a certain Court of Pleas and Quarter Sessions, held for the County of Wayne, on the third Monday of November, 1816, *a certain issue duly joined* in the said Court between A and B, in a certain plea of trespass on the case upon promises, in which the said A was Plaintiff and the said B was defendant, came on to be tried; and that upon the trial of *said issue so joined*, C was examined as a witness, and committed the perjury as set forth in the indictment. The transcript of the record of this suit, offered in evidence upon the trial of the indictment, did not show that *any issue had been joined*. The Defendant was convicted, and a new trial granted, upon the ground that the transcript of the record did not support the charge in the indictment.

In an indictment for perjury, it is necessary to set forth that the oath was taken in some judicial proceeding, before a competent jurisdiction, and upon a point material to the issue depending; and by the common law, it was necessary to set forth the record of the cause wherein the perjury alleged is charged to have been committed; to prove on the trial that there is such a record, by producing it, or a certified copy thereof; and when produced, it must agree with that set forth in the indictment, without any material variance.

Since the act of 1791, ch. 7, it is not necessary to set forth the record of the cause, in the indictment: But if it be recited, the recital must be correct, or the prosecution must fail.

The defendant was indicted for perjury, committed in Wayne County Court, upon the trial of a suit between John Ammons and Robert G Green. The indictment was as follows: to wit,

"STATE OF NORTH CAROLINA, Wayne County. } *Superior Court of Law, the first Monday after the fourth Monday of March, A. D.* 1817.

The Jurors for the State, upon their oath present, that at a Court of Pleas and Quarter Sessions holden for the County of Wayne, before the Justices of the said Court, on the third Monday of November, in the year of our Lord one thousand eight hundred and sixteen, at the town of

Waynesborough, in the said county of Wayne, agreeably to the act of the General Assembly in such case made and provided, a certain issue duly joined in the said Court, between John Ammons and Robert G. Green, in a certain plea of trespass on the case upon promises, in which the said John Ammons was the Plaintiff, and the said Robert G. Green the Defendant, came on to be tried in due form of law, and was then and there (124) tried by a Jury of the county in that behalf duly sworn and taken between the parties aforesaid: and the Jurors aforesaid, upon their oath aforesaid, do further present, that upon the trial of the said issue so joined between the parties aforesaid, Joshua Ammons late of the county of Wayne, laborer, appeared as a witness for and in behalf of the said Robert G. Green, the Defendant in the issue aforesaid, and was sworn, and then and there took his corporal oath upon the holy gospel of God before the said Court, to speak the truth and nothing but the truth, touching and concerning the matter in question in the said issue, the said Court then and there having sufficient and competent power and authority to administer an oath to the said Joshua Ammons in that behalf: And the Jurors aforesaid, upon their oath aforesaid, do further present, that upon the trial of the said issue so joined between the parties aforesaid, certain questions then and there became and were material, that is to say, whether he the said Joshua Ammons had sold to the said Robert G. Green, the Defendant, a certain quantity of pork belonging to the said John Ammons, the Plaintiff, and the brother of the said Joshua Ammons, and whether he the said Joshua Ammons had told him the said Robert G. Green, that he the said Robert G. Green could have a certain quantity of pork belonging to the said John Ammons, the brother of the said Joshua Ammons, at the price of seven dollars and a quarter the hundred weight, and that the said Joshua Ammons being so sworn as aforesaid, not having the fear of God before his eyes, nor regarding the laws of the State, but being moved and seduced by the instigation of the Devil, and falsely, wickedly, wilfully and maliciously contriving and intending as much as in him lay, to prevent justice, and to prevent the due course of law and to cause a verdict to pass against the said Robert G. Green on the trial of the said issue, and thereby to subject him the said Robert G. Green to the payment of sundry heavy costs, charges, and expenses, then and there on the twentieth day of November, in the year of our Lord one thousand eight hundred and sixteen aforesaid, at the County of Wayne aforesaid, falsely, wickedly, wilfully, maliciously and corruptly, and by his own act and consent did say, depose, swear, and give in evidence, among other things, to and before the said Jurors so sworn to try the said issue as aforesaid, and the said Court, in substance and to the effect following, that is to say, that he the said Joshua Ammons did not sell his brother's pork (meaning the aforesaid quantity of pork belonging to the said John Ammons, the brother of the said Joshua Ammons) to the said Robert G. Green: and that he (meaning the said Joshua Ammons) did not tell him (meaning the said Robert G. Green) that he (meaning the said Robert G. Green) could have the pork (meaning the aforesaid quantity of pork belonging to the said John Ammons) at the price of seven dollars and a quarter the hundred weight: whereas in truth and in fact, he the said Joshua Ammons, before the taking of his oath as aforesaid, to wit, on the seventh day of January (125) in the year of our Lord one thousand eight hundred and sixteen, at the County of Wayne aforesaid, had sold to him the said Robert G. Green, the aforesaid quantity of pork belonging to the said John Ammons; and whereas in truth and in fact the said Joshua Ammons, before the taking of his oath as aforesaid, to wit, on the said seventh day of January, in the year last aforesaid, at the County of

Wayne aforesaid, had told the said Robert G. Green that he the said Robert G. Green could have the aforesaid quantity of pork belonging to John Ammons, the brother of the said Joshua Ammons, at the price of seven dollars and a quarter the hundred weight: And the Jurors aforesaid, upon their oath aforesaid, do say, that the said Joshua Ammons, on the said twentieth day of November, in the year of our Lord one thousand eight hundred and sixteen aforesaid, at the County of Wayne aforesaid, before the said Court, having competent and sufficient power and authority to administer the said oath to the said Joshua Ammons as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner and form aforesaid, upon his oath aforesaid, did falsely, wickedly, wilfully, maliciously and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of the laws of the State, to the great damage of the said Robert G. Green, to the evil example of all others in like cases offending, contrary to the act of the General Assembly in such cases made and provided, and against the peace and dignity of the State.

J. R. DONNELL, *Sol.*"

Upon the trial of the indictment, the Solicitor for the State offered in evidence the following certified copy of the record of the suit named in the indictment; to wit:

"STATE OF NORTH-CAROLINA.

"*To the Sheriff of Wayne County, Greeting:*

"You are hereby commanded to take the body of Robert G. Green, if to be found in your County, and him safely keep so that you have him before the Justices of our Court of Pleas and Quarter Sessions at the Court to be held for the County of Wayne, at the Court-house in Waynesborough, on the third Monday in May next, then and there to answer John Ammons in a plea of trespass on the case to his damage four hundred pounds.—Herein fail not and have you then and there this writ. Witness, John McKinnie, Clerk of said Court at Office, the third Monday of February, A. D. 1816, and in the 40th year of our Independence.

"JOHN McKINNIE, C. C.

"Issued the 6th day of April, A. D. 1816."

"The subscribers acknowledge themselves bound in the sum (126) of one hundred pounds for the prosecution of this suit.

"JOHN AMMONS, (Seal.)
"H. COOR, (Seal.)

"Executed,
"WM. RAIFORD, Sheriff.

"STATE OF NORTH CAROLINA, Wayne County. } Court of Pleas and Quarter Sessions, November Term, 1816.

"JOHN AMMONS *v.* ROBERT G. GREEN.

"*Writ Case.*

"Jury charged, find for the plaintiff on all the issues, and assess his damages to four hundred and twenty-three dollars and thirty cents, and costs; of which $405:08, is principal."

On behalf of the Defendant, it was urged upon the trial, that this copy of the record did not shew that any issue had been joined between the parties, and therefore did not support the charge in the indictment.—The Jury found the Defendant guilty; and a rule for a new trial being obtained, the same was sent to this Court.

HALL, Judge, delivered the opinion of the Court.

In a case of perjury, it is necessary to be charged that the oath was taken in a judicial proceeding before a competent jurisdiction, and upon a point material to the issue depending. 1 Term Rep 69. In the indictment, it is necessary to set forth the record of the cause wherein the perjury complained of, is charged to have been committed, and also to prove on the trial that there is such a record, by producing it; and when produced it must agree with that set forth in the indictment, without any material variance. 1 Haw. 332, Sect. 23, 6 Mod. 168. In this case, the indictment states that the perjury was committed "on a certain issue duly joined in the said Court between Robert Ammons and Robert G. Green." The record produced does not shew that there had been any issue joined. The copy of the record is certified by the proper officer of the Court, and we are bound to receive it as a true copy, though the fact may be, (and the finding of the Jury renders it probable) that the issue had been joined. "The Jury find for the Plaintiff on 'all the (127) issues,'" when it does not appear that any issue had been joined. In the case of the King *v.* Dowlin (5 Term 311), where the Defendant was indicted for perjury committed on the trial of captain Kimber for murder, one reason urged in arrest of judgment was, that no plea appeared by the record to have been pleaded on the trial of Kimber, and consequently there could not have been a legal trial, in which perjury could have been committed. The Court seemed to think this might have been a good reason at common law; but that by the statute of Geo. 2, ch. 11, it is not necessary to set forth the record or any part thereof, in which the perjury is alleged to have been committed, but only to set forth the substance of the offence charged upon the Defendant; and in that case, the indictment did not recite the record of the trial against Kimber, but only stated that at a Court of Oyer and Terminer, Kimber was in due form of law tried upon a certain indictment for the murder of A. Our act of Assembly passed in the year 1791, ch. 7, sect. 3, is copied from that statute. But the difference between the case of the King *v.* Dowlin and the present case, is this; in that case the indictment did not recite the record in which Kimber was tried, and in which it was alleged the perjury was committed; in this case, the indictment recites the record, and no such record as that recited is produced. It is not necessary that the record should be recited; yet if it be attempted, the recital must be correct, or the prosecution must fail. 2 Haw. 349. The King *v.* Dowlin, 5 Term Rep. 311. 5 Bur. 2084. 2 Stra. 775. The rule for new trial must be made absolute.

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(128)

MAURICE SMITH *v.* WOODSON DANIEL, JOSIAH DANIEL and ELIZABETH DANIEL, Executors and Executrix of the last will of JOSIAH DANIEL, Sen., deceased, and against ROBERT WADE.

From Granville.

A recovers a judgment at law against B and C, which is stayed by injunction. B dies and the suit in Equity is prosecuted by C, who also dies before the hearing, making his will, and bequeathing a negro girl slave to his daughter Elizabeth. A decree is made after his death, dissolving the injunction in part, and giving A leave to proceed upon his judgment at law. Neither the representatives of B or C are made parties to this decree. A sues out his execution against the goods, chattels, lands and tenements of B and C; which execution the Sheriff levies upon the negro girl slave, bequeathed to Elizabeth, and then in her possession by the assent of the executors; he sells her for 60*l.* and pays the money into the office, he being ignorant of the bequest. Elizabeth sues the Sheriff, and recovers the value of the negro girl. And the Shereiff thereupon moves the Court for leave to amend his return on the execution, so as to set forth the fact that there was no property of B to C to be found; and also for leave to withdraw from the office the money which he had paid in. This motion allowed: for,

Upon the application of Elizabeth, the Court would have restored the property after the seizure; and, as she elected to bring a suit against the Sheriff, he should be considered as standing in her place, and having the rights which she had before the action was brought.

The Sheriff may be permitted to make a return upon an execution, or to amend it according to the truth of the case, at any time after the return day, even where important consequences as to the rights of the parties may be produced by such amendment.

This was a motion on behalf of Maurice Smith, Sheriff of Granville county, for leave to amend his return on the execution hereafter mentioned, upon the following case: Robert Wade sued out a writ, returnable to Granville County Court, at May term, 1800, against John Boyd and Josiah Daniel, sen'r, which was duly executed and returned, and the Plaintiff therein obtained judgment at May term, 1801—the Defendants filed their bill in the Court of Equity for Hillsbo-

rough district, praying an injunction against the judg-
(129) ment at law, which was granted. Boyd then died,
and the suit in Equity was prosecuted by Daniel alone until the beginning of the year 1811, when he died, having previously made and published his last will and testament, which was proved in Granville County Court, at August term, 1811; of which will he appointed Woodson Daniel, Josiah Daniel and Elizabeth Daniel, executors and executrix. Woodson Daniel alone took out letters testamentary. At September term, 1812, the Court of Equity made the following decree in the cause, to-wit: "The Court doth confirm the Master's report, and decree that the injunction be made perpetual as to 15*l.* 2*s.* 4½*d.* and be dissolved for 30*l.* 6*s.* 0½*d.* the remainder of the said judgment, with interest due thereon, and that the Defendant have leave to proceed at law for the same." At the time of making the decree, Boyd and Daniel were dead, and the representatives of neither had been made parties to the suit. On the 22d October, 1812, Wade sued out a *fieri facias* on his judgment at law for the 30*l.* 6*s.* 0½*d.* and interest and costs, against the goods and chattels, lands and tenements, of Boyd and Daniel, returnable to November term, 1812, and delivered it to Smith, the Sheriff, who returned on it that it "came too late to hand." Another *fi. fa.* issued from November term, 1812, returnable to February term, 1813, but was not delivered to the Sheriff. Another *fi. fa.* was issued from February term, 1813, returnable to May term, 1813, which was delivered to Smith, and which he levied on a negro slave named Nelly, and he sold her in the usual manner, and returned on the *fi. fa.* as follows, to-wit: "Levied on a negro girl, Nelly, and all the right and title of the Defendant, Josiah Daniel, sold at public sale on the 26th April, 1813—James Edwards bought said negro for 65*l.* This debt and costs satisfied out of the money arising from said sale."

Josiah Daniel, by his will, bequeathed the negro girl Nelly to Elizabeth Daniel, the executrix of his will, who, after the probate thereof, took the girl Nelly into her posses-
(130) sion, claiming to hold her as legatee, and by the
assent of the executors, Woodson Daniel and Josiah Daniel, jun. But such claim and assent was unknown to Smith. In May, 1813, Elizabeth Daniel brought an action of trespass against Smith, for the seizing and selling of Nelly, in Granville Superior Court of Law, which came on for trial

at March term, 1815, when a verdict and judgment were rendered for her, for the value of her interest in Nelly; which judgment Smith paid. Whereupon, Smith obtained a rule in the County Court at May term, 1815, on Wade, and also on the executors and executrix of Josiah Daniel, sen'r, to show cause why he should not amend his return on the *fi. fa.* aforesaid, or set the said *fi. fa.* aside, and he be allowed to draw from the office the money paid in by him on the same. Upon the hearing of the rule, it was made absolute, and Smith was allowed to amend his return by striking out the whole thereof, and inserting the words "There are no goods, chattels, lands and tenements of the Defendants to be found." And he was permitted to receive from the clerk the monies paid into the office on the *fi. fa.* From this judgment Woodson Daniel appealed to the Superior Court of Law for Granville county; and the said rule and motion coming on to be heard at September term, 1816, it was ordered that the same be sent to this Court for their opinion, Whether the order of the County Court should be affirmed, or what other or further order, rule or judgment, should be given in the premises.

Taylor, Chief Justice, delivered the opinion of the Court:

Wade recovered a judgment in May, 1801, against J. Boyd and Josiah Daniel, sen'r, which they stayed by injunction. Boyd died, and the Equity suit was prosecuted by Daniel alone, until 1811, when he died, having appointed Woodson, Josiah and Elizabeth Daniel his executors and executrix, of whom Woodson alone took out letters testamentary.

(131) At September term, 1812, the injunction was dissolved as to a part of the sum enjoined, and the Plaintiff at law was allowed to proceed. He did so, without making either the representatives of Boyd or Daniel parties to the judgment, by suing out a *fi. fa.* in October, 1812, and two others afterwards; the last of which was levied by Smith, the Sheriff, on a negro girl named Nelly, all the right and title of whom, was sold by the Sheriff on the 26th April, 1813, to James Edwards, and the judgment was satisfied out of the sale; to which effect a return was made on the *fi. fa.* It seems that Nelly had been bequeathed by Josiah Daniel to Elizabeth, who took her into possession with the assent of the executors, and held her as legatee. Elizabeth sued Smith and recovered from him the value of Nelly, which he paid, and he now moves to amend his return on the execution and

withdraw the money from the office. It is admitted, that the bequest to Elizabeth and the assent of the executors was unknown to Smith. The motion appears to be supported by manifest justice; and a compliance with it is doubtless authorised by law. The Sheriff has paid out of his own pocket, the sum recovered by Elizabeth, for doing what, to all appearance, was an official duty in the ordinary course of law. He knew not of the irregularity of the execution, or of the right of Elizabeth to the slave: and although this was no justification to him, as against Elizabeth, whose property he had seized under an execution against Josiah's estate, yet as against Wade, who claims the money made by the sale, and who sued out a void execution, it gives the Sheriff the strongest possible claim. This execution might have been set aside on the motion of Josiah Daniel's representatives; and upon the application of Elizabeth, inasmuch as her right to the negro was clear, the Court would have restored the property after the seizure. 1 Ld. Ray. 439. Bingham on Judgments, 264. But as she elected to bring a suit against the Sheriff, he should be considered as standing in her place, and having the rights which she had (132) before the action was brought. It is not just that Woodson Daniel should oppose this motion, unless it be justice that the debts of one person should be paid out of the estate of another. That a Sheriff may be permitted to make a return upon an execution, or amend it according to the truth of the case, at any time after the return day, is shewn by the cases of Bullit's executor *v.* Winston, and Baird *v.* Rice; the cases too, where important consequences, as to the rights of parties, were produced by such amendment. The execution in the case at bar was void, because issued after the death of Josiah Daniel, without making his executors parties: but I do not apprehend it was necessary to revive the judgment after the year, where a Plaintiff has been prevented from suing out execution by the Defendant's obtaining an injunction out of Chancery. The case of Mitchell *v.* Cue *et* Uxor, overrules the cases in Salkeld and Strange to the contrary; the Court saying that this rule of reviving a judgment of above a year old by a *scire facias*, before suing out execution upon it, which was intended to prevent a surprise upon the Defendant, ought to be taken advantage of by a defendant who was so far from being surprised by the Plaintiff's delay, that he himself had been try-ing all manner of methods, whereby he might delay the Plaintiff; and, therefore, they not only discharged the rule, but discharged it with costs 2 Burr. 660. The Court are of opinion, the motion made on behalf of Smith should be allowed.

(133)

JOHN DAVIS, Adm'r of BARNABY BULLS *v.* JACOB BROOKS.

From Johnston.

Construction of the act of 1806, relative to the gifts of slaves. The act was made to put an end to litigation, perjury, and the difficulty of investigating ancient transactions, of which parol gifts of slaves had been so fruitful.

The second proviso to the third section exempts the case of a gift from a parent to a child, of slaves which remain in possession of the child at the time of the death of the parent, intestate. In such case the slave or slaves are to be considered as an advancement to the child, and to be regulated by the laws then in force relating to advancements made to children by a parent in his life-time.

Such advancement is a gift, or not, at the option of the child: if after the death of the parent, he elect to bring it into hotchpot, he may do so, and come in for a distributive share; but if he be satisfied with what he has received, he may consider it as a gift, protected by this proviso: and this proviso is not confined to gifts theretofore made, but extends to gifts thereafter to be made.

This was an action of detinue for the recovery of negro Nanny and her children, and negro George.

On the part of the Plaintiff, it was proved that these slaves were once the property of Barnaby Bulls; that his daughter intermarried with Willis Watson in the month of June, 1807, and that shortly after the marriage Bulls told the negro Nanny that she must go to Watson's, and wait upon his daughter; that he would not part her from her husband, but she must go and stay until he got another to send in her place. Another witness proved that a few days before Nanny went to Watson's, Bulls said he intended to send her there to wait on his daughter. Another witness swore that he was once called upon by Watson to write his will, and that Watson, after disposing of other property, said, that as to Nanny and her children, he would have nothing to do with them, but leave them to his wife and her father to manage. This witness also swore that George went into Watson's possession in the spring of 1807 or 1808, from three to six months after the marriage; that he had only one (134) conversation with Watson about the negroes, and that was when he was called upon to write his will;

and being asked to repeat the conversation, he said that Bulls told him he had bought the negroes at John N. Smith's sale, and had sent them to him, and that his wife might have them; he would have nothing to do with them. Upon further examination, he said, Watson told him the negroes were not his property; and upon his last examination, he said, Watson's remark was, that Bulls and Betsey (Watson's wife) might do as they pleased with them. There were circumstances in the appearance of this witness, and variations in his evidence, which called upon the jury for an exercise of their judgment as to his credibility.

Another witness swore that she had lived some time in Watson's house, and frequently heard Watson say that the negro Nanny and her children were not his property: that Bulls had never given them to him, and he did not expect he ever would; that he had a mind to send them home, as they were only an expense to him.

As to the negro George, the evidence was that he come into the possession of Watson after the marriage; and a witness said that wishing to purchase him, he applied to Bulls for the purpose, who told him that he had given the negro to Watson and he must apply to him.

Barnaby Bulls died intestate, leaving Watson and his daughter surviving him. Watson died, and the Defendant, as his Executor, took the negroes into his possession. One Jernigan then married the widow Watson, and applied to Brooks, the Defendant, to know whether he would deliver the negroes up to Bulls' administrator? He answered that he would hold them as the property of Watson, whereupon this suit was brought.

The Judge left it to the Jury to say whether a parol gift had been made by Bulls to Watson; and instructed them that if they believed such gift had been made, the Plaintiff could not recover; but if they believed there was
(135) only a loan of the negroes, he should have a verdict.
The Jury found for the Defendant, and a rule for a new trial being obtained, the same was sent to this Court.

TAYLOR, Chief Justice, delivered the opinion of the Court:

The act of 1806 was made to put an end to litigation, perjury, and the difficulty of investigating ancient transactions, of which parol gifts of slaves had been so peculiarly prolific. With this view, the sixth clause requires that such gifts shall be in writing, signed by the donor, attested by at least one credible witness, and proved or acknowledged, and registered within one year, in the county where the donee resides, provided he be in the actual possession, otherwise to be registered in the county where the donor resides. From this general purview, the second proviso to the third section exempts the case of a gift from a parent to a child, of slaves which remain in possession of the child at the time of the death of the parent, intestate. In such case, the slave or slaves are to be considered as an advancement to the child, and to be regulated by the laws then in force relating to advancements made to children by a parent in his life-time. The case described in this proviso has then occurred in the state of facts exhibited in this case; and no law then in force permitted the recovery of an advancement by the representatives of the parent. It is a gift, or not, at the option of the child advanced; if, at the death of the parent, he elect to bring it into hotchpot, he may do so, and come in for a distributive share; but if he be satisfied with what he has received, he may consider it as a gift, and a gift protected by this proviso. There is nothing in the language of the proviso, from which an intention in the legislature can be inferred to confine its operation to gifts theretofore made. If such only had been intended, it is highly probable that the language used would have been more explicit, and more expressive of such an intent. But the words "*shall have put*" clearly embrace the case before us. There must be judgment for the Defendant.

(137) THE UNITED STATES *v.* THOMAS WHITMELL.

From Halifax.

The Defendant obtained a licence to distil, under the act of Congress passed 24th July, 1813. After the passage of the act of 21st December, 1814, laying a duty of twenty cents per gallon on spirits distilled, he failed to give notice to the Collector of the Internal Revenue of his intention to desist from stilling under his licence, after the 1st February, 1814. By reason of this neglect, he became liable to pay the duties laid by both acts.

The following affidavits disclose the facts of this case:

"STATE OF NORTH CAROLINA.

Thomas Whitmell maketh oath, that on or about the 12th day of November, 1814, he entered with the Collector of the Internal Revenue for the district of Halifax, four stills, for the distillation of spirits from domestic materials, for the term of twelve months, and obtained from him a licence. That after the additional duty of twenty cents per gallon was laid by Congress, on spirits distilled, he withdrew two of his small stills. That afterwards, and before the expiration of his licence, he was warned by the collector not to distil under his licence alone; that if he should, he would incur the penalties inflicted by the act of Congress imposing additional duties. That, in consequence of this warning, he gave bond with security for the payment of the additional duty of twenty cents per gallon: on which bond suit had been instituted and judgment recovered in Halifax County Court, for 228 dollars:—with this judgment the deponent was dissatisfied, and from which he would have appealed, had he been able at the time to give security: that he was now able to give security, and he prayed for a writ of certiorari."

The writ of *certiorari* with a supercedeas, having been awarded upon this affidavit, Rhesa Read, the Collector of the Internal Duties, came into Court, and filed the following affidavit, to wit,

"*Halifax County—Sct.—Superior Court of Law, April Term,* 1817.

THE UNITED STATES *v.* THOMAS WHITMELL.

Rhesa Read maketh oath that after the passage of the act of Congress laying additional duties upon distilled spirits, he informed the Defendant that he must comply with the requisites of said act, by giving bond and security for the payment of the said duties, agreeably to the (138) directions of the said act, or he should consider it to be his duty, as Collector for the District, to enforce the penalties of the act against him. That Defendant gave bond with security accordingly, and having made a return of the spirits distilled by him, and neglected for eleven months to pay the duties, suit was instituted on his bond, and the judgment obtained of which Defendant complains. That the judgment thus obtained, was founded upon and was pursuant to the return which the Defendant had made, of the spirits distilled by him."

A motion was made to dismiss the *certiorari*, and

DANIEL, Judge, delivered the opinion of the Court:

The Defendant had obtained a license under the act of Congress passed 24th July, 1813, which laid a tax on stills according to their *capacity.* The act of 21st December, 1814, laid a duty of twenty cents on every gallon of *spirits distilled,* in addition to duties payable for licences. The objects of taxation in the two acts are different, and there is no constitutional objection to enforcing the provisions of the last act against the Defendant. The circumstance of his having a licence under the first act, did not exempt the spirits distilled from the duties imposed by the last act. Nor do I see that the contract (if the licence be considered as constituting one) between the United States and the Defendant, is impaired by enforcing the provisions of the last act: for, in addition to the circumstance that the objects of taxation are different, and each a fair one, if the exigencies of the country demanded a revenue from them, a provision is made in the 17th section of the act of 1814, to relieve the Defendant and others in his situation from the duties under the licence, from the time of notifying the Collector of the fact, provided he gave such notice, and desisted from stilling before the first February, 1815. If he did not desist from stilling, and has thought proper to proceed, he has become liable to pay the duties laid by both acts; and there being no presumption that the judgment is for a larger sum than what is due to the United States, the certiorari must be dismissed.

(139)

EBENEZER MacNAIR v. THOMAS RAGLAND and others, Executors of the last will of RICHARD KENNON, deceased.

From Orange.

Bill filed by a surviving partner against the executors of the acting partner of a firm, for an account and settlement of the partnership transactions. By the articles of copartnership, the acting partner was to collect whatever debts might be due at the termination of the partnership, and account for the same as he received them, or as often as the other partners should require. The partnership was dissolved on 4th August, 1774, except as to such matters as necessarily related to the settlement of their accounts, the collection of their debts, and closing of their affairs. The books and papers were left in the hands of the acting partner, and in April, 1777, he exhibited a balance sheet, shewing, 1st. The sum due to the other partners for stock advanced by them. 2d. The amount of moneys, securities for money, and property belonging to the firm. In July, 1777, the acting partner made a payment in part to the other partners for stock advanced by them, and they being British subjects, shortly afterwards were obliged to leave the State, in consequence of the then existing hostilities. The bill was filed in 1800, and the Defendants pleaded the statute of limitations, and stated in their plea, that in April, 1777, their testator stated and settled an account with the other partners; which stated account is the balance sheet before mentioned: That the cause of action, if any, accrued to the other partners at that time, and that more than three years have run since that time, &c.

Plea overruled with costs: for the acting partner was bound to collect the debts, and settle the business of the firm, and account as often as the other partners should require. No such requisition was made until about the time of filing the bill. The acting partner was a trustee for the others; he received the moneys and property of the firm in that character, and he was liable to pay when they should require it; and it was only when they required it, and he refused, that his fiduciary character was put an end to, and the statute attached.

Ebenezer MacNair, of the City of Richmond, in Virginia, filed his bill in the Court of Equity for the District of Hillsborough, and charged that on the 24th day of August 1771, his brother, Ralph MacNair, late of Hillsborough, Merchant, entered into partnership with Richard Kennon, of Chatham County, for the purpose of carrying on trade as Merchants and partners, in Chatham County, under the firm of (140) "Richard Kennon and Company," agreeably to the articles duly executed by them, and written in the words and figures following, to wit,

"Articles of Copartnership entered into this 24th day of August, A. D. 1771, between Ralph MacNair and any person he may hereafter take in with himself, on the one part, and Richard Kennon, on the other part, witnesseth: First, That the said Copartnership shall commence on the 15th day of October next or before, if the said Ralph MacNair's fall goods come to hand, and shall continue as long as the parties are inclined; they the said Ralph and Richard sharing each the equal half of all loss and gain by the trade carried on under these articles. Second, That the said Ralph MacNair shall charge to the new Company whatever goods he can supply from his next fall and spring cargoes, to be delivered at Hillsborough, at the rate of seventy per cent. advance from the sterling cost, for Virginia money; and Virginia money in room of sterling, for the packages, and no more. That for the future supply of the store, he the said Ralph MacNair shall import goods twice a year, agreeable to schemes or orders by the said parties mutually made out for that purpose, and shall charge them at the same rate as above mentioned; allowing twelve months credit for all the goods they supply, and charging interest for what is not paid in that time; and allowing a discount for what is paid before. And that in case of goods being taken or lost, or the store being otherwise disappointed of goods, or at other times assortments be wanted, they shall be purchased wherever the parties shall judge best for the advantage of the concern. Third, That the new Company shall allow the said Richard Kennon for the land and improvements whereon he now lives in the County of Chatham, called Stony Hill, whatever they shall be found to have cost him, valuing the goods paid to workmen and others, for building, improving, &c. at the rate of 133 1-3 proclamation money advance from the sterling cost, which shall be guessed at by the parties. He also shall charge whatever goods he may have on hand at the commencement of this Copartnership, at the rate of seventy per cent. Virginia money from the sterling cost; and the currency articles at what they shall have cost him at that place; also his household furniture and bay horse. All which articles shall remain afterwards in equal Copartnership, in the same manner as every thing else belonging to the concern. Fourth, That the said Richard Kennon shall reside at Stony Hill, or at whatever place the parties may think proper to remove the store to, and take upon him the management of the concern, with such assistance as they may think necessary. For which services he shall be allowed at the rate of forty pounds proclamation money per annum, out of the profits of the trade; and shall charge himself after the rate of 133 1-3 per cent. advance for proclamation money from sterling, and no more, for all the goods he may want for (141) himself and his negroes; every other expense attending the business, coming as a proper charge against the concern. Fifth, That the firm of the Company shall be Richard Kennon and Co.; and neither of the parties shall be able to discontinue the trade without giving twelve months notice to the other. That an inventory shall be regularly taken once a year about the first of July, and a true state of the affairs made out, of which a copy with a list of the debts deemed bad, shall be delivered to the said Ralph MacNair. And that the said Richard Kennon shall collect whatever debts may be due at the termination of this Copartnership, and finally settle the affairs of the concern with what assistance they shall think necessary; and shall account for the same as he receives it, or as often as the said Ralph MacNair shall require. Lastly, That in case of the death of either party, an inventory shall be immediately taken, in which the goods on hand, debts, houses, and every other thing belonging to the concern shall be valued as in the next preceding inventory; and that the debts due by the store being first paid off, the share of the deceased partner shall be paid to his heirs as it shall be collected, or in two equal yearly payments, the first term of payment to be after the expiration of two years after such decease. In witness whereof the parties have hereunto set their hand and affixed their seals the day and year first above written.

"RALPH MacNAIR, (Seal.)
"RICH'D KENNON, (Seal.)

"Sealed and delivered in the presence of
"John M'Clellan,
"Arch'd Campbell."

The bill then charges, that at the time these articles of copartnership were entered into, the Complainant was a copartner in trade with his brother Ralph, in the town of Hillsborough, and immediately afterwards he became a partner in the firm of Richard Kennon & Co. Richard Kennon retaining one-half of the interest in the said concern, and Complainant taking one-third, and his brother Ralph retaining two-thirds of the other half.

That Complainant, with his brother Ralph, immediately afterwards, and from time to time, supplied Richard Kennon, as acting partner of the firm of Richard Kennon & Co. with goods to a large amount, until the 4th day of August, 1774, when it was agreed between the partners that the business of the concern should cease, as to all matters, except such as necessarily related to the settlement of their accounts, (142) collections of their debts, and the closing of their affairs as copartners

That agreeably to the article which required that Richard Kennon should collect whatever debts might be due at the termination of the copartnership, and finally settle the affairs of the concern, it was also agreed on the said 4th day of August, 1774, that Kennon should immediately set about the collection of the company's debts, and the settlement of all the affairs of the concern; and, for that purpose, all the books and papers belonging to the concern were left in his hands; that he proceeded to collect the debts and settle the business; and, on the 10th of April, 1777, produced to the

Complainant and his brother Ralph the balance account signed by him for Richard Kennon & Co. (a copy of which was annexed to the bill:) by which it appeared that the company's property then in his hands, in money, securities for money, &c. amounted to 3,069*l.* 0*s.* 10*d.*, and that the sum of 1,853*l.* 5*s.* 3*d.* was due to Complainant and his brother Ralph for goods furnished to the concern.

That Kennon was requested to continue the collection of the debts and the settlement of the business, and that on the 1st day of July, 1777, he made a payment to Complainant and his brother of 141*l.* 10*s.* 1*d.*

That shortly afterwards, the Complainant and his brother, being merchants, trading to Great Britain, and being natural born subjects of his Britannic Majesty, were obliged to depart from the state, leaving the books, papers, property and business of the concern of Richard Kennon & Co. in the hands af Kennon, who was to proceed to collect the debts and settle the business of the concern.

That Ralph McNair has died, having made his will and appointed Complainant his executor; that Richard Kennon having collected the debts due to the concern, and converted the money and property of the concern to his own use, has also died, having made his will and appointed (143) Thomas Ragland, Boling Hines and Celia Kennon his executors and executrix; who have proved the will and taken out letters testamentary. That he died possessed of or entitled to a large personal estate, more than sufficient to satisfy the demands of the Complainant; that the books and papers of the firm of Richard Kennon & Co. also came to their hands, and that they refuse to come to any settlement with the Complainants. The bill prayed for an account, and that the Defendants might be decreed to pay such sum as should be found due on such account.

To this bill, the Defendants entered the plea of the statute of limitations, and therein stated, that in the life-time of Richard Kennon, to-wit, on the 10th day of April, 1777 he stated and settled an account in writing with Ralph MacNair and the Complainant, and which was assented to by them, of and concerning the goods and stock which had been supplied to the partnership of Richard Kennon & Co. by Ralph MacNair and the Complainant, making a balance of 1,853*l.* 5*s.* 3*d.* then due to them in respect thereof; and also of and concerning the whole money, securities for money, and property of the partnership trade, and of and concerning the profits and gains made thereby; and it thereby appeared, that there then was in Richard Kennon's hands, in money, securities for money, and other property belonging to the partnership trade, to amount of 3069*l.* 0*s.* 10*d.*: That the goods and stock were so supplied, and the monies and property, if collected and received, (which Defendants did not admit) were so collected and received by Richard Kennon, and the said account so stated and settled, and what was due from him to Ralph MacNair and Complainant, became due in the life-time of Richard Kennon, and more than three years before the filing of the bill or serving of any process to appear and answer thereto. That if Complainant or Ralph MacNair, had any cause of action against Richard Kennon in his life-time, or against the Defendants since his death, for or concerning any of the matters or things contained in the bill, the same did accrue (144) above three years before filing the bill, or serving of process to appear and answer thereto: and that neither Richard Kennon, in his life-time, nor the Defendants, since his death, did at any time within three years before filing the bill or serving process to appear and answer thereto, promise or agree to come to any account for or to pay or any way satisfy the Complainant or Ralph MacNair, any money or other thing for or concerning the matters or things set forth in the bill, &c.

This plea being set down for hearing, was sent to this Court: and

Taylor, Chief-Justice, delivered the opinion of the Court:

The bill is brought by Ebenezer MacNair, surviving partner of Richard Kennon & Co. against the executors and executrix of Richard Kennon, for an account and settlement of the partnership transactions. The bill was filed in October, 1800, and in April, 1802, the Defendants entered a plea of the statute of limitations, which states, that in April, 1777, their testator stated and settled an account with the Complainant and the deceased partner, Ralph MacNair, making a balance of one thousand eight hundred and fifty-three pounds, five shillings and three pence, due to the Complainant and Ralph MacNair, for merchandise furnished to the copartnership; and another balance of three thousand and sixty-nine pounds and ten pence, in Kennon's hands, for money, securities and property, if collected and received: and the plea avers, that the cause of action, if any ever existed, accrued more than three years before the filing of the bill. The real transaction between these parties is set forth in the bill; and the articles of copartnership shew that this plea cannot be sustained. According to the fourth article of copartnership, Kennon was to manage the concern with such assistance as the parties might think necessary; and by the fifth, he was to collect whatever debts might be due (145) at the termination of the copartnership, and to account for the same as he received them, *or as often as the said Ralph MacNair should require.* The partnership was dissolved by mutual consent, on the 4th August, 1774, except as to such matters as necessarily related to the settlement of their accounts, the collection of their debts, and closing their affairs as copartners; and for these purposes, Richard Kennon was authorised according to the fifth article; and the books and papers were left in his hands. It was in pursuance of this authority, that in April, 1777, he exhibited a balance sheet, the paper set up in the plea, as a stated account, and while the business of collection was yet in progress and incomplete. A payment was made by Kennon in July, 1777, on account of the stock furnished; but the payments as to the profits were to await the final collections and settlement. This was not effected until after the Complainants had been obliged to leave the State in consequence of hostilities. And until it were completed, Kennon had in his hands the moneys of the Complainant, refusing to pay them upon request. In this state of things the statute of limitations could not attach upon the demand. The statement furnished by Kennon, was to shew from time to time the progress he was making; the moneys were received by him in the character of a trustee, liable to pay what he received, when his copartners should require it; and it was only when they did require it and he refused it, that the fiduciary character was put an end to. Upon any other construction, the statute would begin to run upon every separate sum, however small, as it was received by Kennon; and the Complainants could only recover such sums as were received within three years before the bill filed. The plea must be overruled with costs.

(146)

THE GOVERNOR TO THE USE OF HORACE DADE *v.* WILLIAM S. MORRIS.

From Craven.

A Constable was appointed for "the district of Newbern," in Craven county, and gave bond "well, truly and faithfully to discharge his duty as Constable in the said district." In an action on this bond for neglect to collect money on an execution which was put into his hands, proof that the Defendant in the execution had property in Craven county, but out of the district of Newbern, will not support the action.

The powers and duties of Constables are co-extensive with the limits of the county within which they are appointed. The word "district," used in the 7th section of the act of 1741, ch. 5, does not restrict their powers or duties to any section of the county; it is merely directory to the County Court to make an appointment where a vacancy happens.

But although, for this reason, the Constable in the present case is liable in an action on the case for breach of duty any where in the county of Craven; yet, being sued on his bond, the covenant in which is, that he will discharge his duty within the district of Newbern; if the breach assigned were that he did not discharge his duty *generally*, there would be a variance between the bond and the breach; if, that he did not discharge his duty within the district of Newbern, the evidence does not support the breach.

The action was brought on the following bond, to wit:

"Know all men by these presents, that we, William S. Morris, David Lewis, and Daniel Shackleford, of the county of Craven, are held and firmly bound unto his Excellency William Miller, Esq. Captain General, Governor and Commander in Chief in and over the State of North Carolina, in the just and full sum of five hundred pounds, current money, to be paid to his Excellency the Governor aforesaid, his successors or assigns: to the which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this thirteenth day of June, 1815.

The condition of the above obligation is such, that whereas the above bounden William S. Morris has been *appointed Constable for the district of Newbern, in the county aforesaid:* Now, in case the said William doth well, truly, and faithfully discharge his duty as Constable *in the said district*, by executing and making due return of all warrants, precepts and process, which shall come into his hands; and doth well and truly account for and pay all such sums of money which shall come into his hands, by virtue of his office, to the persons entitled to receive the same, and in all things discharge his duty in the said office of Constable, agreeably to law, during his continuance in the said office; (147) then the above obligation to be null and void, otherwise to remain in full force and virtue.

WM. S. MORRIS. [SEAL.]
DAVID LEWIS. [SEAL.]
D. SHACKLEFORD. [SEAL.]

Signed, sealed and delivered
in the presence of
J. G. STANLY, *C. C.*"

The Defendant was appointed by the County Court of Craven a Constable "*for the district of Newbern*" for that year, and resided within that district. Horace Dade, having obtained a judgment against Charles Saunders, sued out execution and placed it in the hands of the Defendant, who gave a receipt for it. Saunders resided occasionally in Newbern and at his farm three miles from Newbern. The Plaintiff proved on the trial, that Saunders had property on his farm sufficient to satisfy this execution; but it appeared that this farm was not within the district of Newbern: and the question arose, Whether the Defendant's failure to raise the money on the execution, he being appointed a Constable for the district of Newbern, and having given bond to execute the duties of Constable within that district, amounted to a breach of the condition of this bond? Which question was ordered to be sent to this Court.

HENDERSON, Judge, delivered the opinion of the Court:

The powers and duties of Constables are co-extensive with the limits of the County within which they are appointed. It was not the intention of the Legislature, by using the word "*district*" in the 7th section of the act of 1741, pointing out the manner filling the vacancies which might happen in the recess of the County Court, to restrict the powers or duties of Constables to any section or part of the County, but only to have filled up a chasm in that part of the County where the vacancy happened; and the term *district* was here used upon a presumption that in making the appointment, the Court would consult public convenience, by interspersing the Constables throughout every part of the (148) County, having the power to appoint as many as the Court should think necessary.

The English authorities cited in the argument have no bearing on this case; for they relate to local jurisdictions, and where the Constable or other officer is constituted for each prosecution. But were it otherwise, they could not apply to our Constables, whose appointment is provided for in our laws for a territory not subdivided into smaller judicial districts; but where a writ, warrant, or other process runs throughout, if it run in any part. But in this case, the Defendant is sued upon his bond, and in this action he is not otherwise liable than upon his bond, the words of which are, that he shall discharge his duty as Constable within the district of Newbern. If the breach assigned were that he did not discharge his duty *generally*, there would be a variance between the bond and the breach: If, that he did not discharge his duty *within the district of Newbern*, the evidence does not support the breach. But there can be no doubt, that upon a bond drawn agreeably to law, the Defendant would have been liable: and that he is liable in an action on the case for the breach of duty any where in the County of Craven.

(149) JOHN R. ADAM *v.* DAVID HAY.

From Cumberland.

In an action against a Common Carrier on the Cape-Fear River, there was a verdict for the Plaintiff, and defendant moved for a new trial, supporting his motion by an affidavit that he expected to prove by the witnesses whom he examined on trial, a custom among the owners and freighters of Boats on the River, which would have excused him from the liability of a common carrier: That he was disappointed in their evidence and thereby surprised: That since the verdict he had discovered witnesses who he believed would prove the custom, and that he did not know of their testimony until after the verdict. Motion for a new trial disallowed.

The Defendant was sued as a common carrier on the River Cape-Fear, between Fayetteville and Wilmington. There was a verdict for the Plaintiff, and a rule for a new trial was obtained upon the following affidavit, to-wit,

"The Defendant swears that he had been induced to believe that the witnesses whom he summoned to prove the custom of the owners and freighters of boats upon the river, would have sufficiently proved the custom, so as to excuse him as a carrier: and that he was surprised at the trial, to learn that they would not. That since the trial he has discovered witnesses who he believes will prove the custom, and that he did not know of their testimony until since the trial."

The rule for a new trial was discharged, and the Defendant appealed to this Court: And

DANIEL, Judge, delivered the opinion of the Court:

We do not see any facts disclosed in the affidavit to induce us to grant a new trial. We know of no custom which could excuse the Defendant from the operation of the law governing common carriers. If such a custom do exist, and it would aid the Defendant, it is strange he should have been unable to prove it on the trial, as the Court was holden in the town where the greatest part of the commercial transactions on the Cape-Fear are carried on. Let the rule be discharged.

(150) JOSEPH GUY *v.* ALEXANDER HALL.

From Iredell.

In an action to recover the value of a negro slave, the Plaintiff gave in evidence a bill of sale for the negro, made to him on the 15th December, 1817. The Defendant claimed title to the negro under the same person, and gave in evidence a bill of sale made to him on the 5th of that month. The Plaintiff alleged that he had purchased the negro before the 5th, and that it was agreed between him and the vendor that they should meet on or about the 15th, when he should give bond with security for the purchase money, and the vendor should make to him a bill of sale: and the declarations of the vendor made between the 5th and 15th were received in evidence to prove these facts.

The declarations or confessions of a person making them are evidence against him, and all claiming under him by a subsequent title. He cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions.

A rule prevailed during Lord Mansfield's time, that no man should be heard either directly by himself, as a witness, by giving his declarations in evidence to impeach an instrument to which he was a party, or to invalidate a title which he had passed away as a good one. This rule was exploded by Lord Kenyon, and the ancient rule restored, of excluding witnesses only upon two grounds, infamy and interest. It is still retained in some of our sister States, as to instruments which are negotiable.

In this case the vendor was alive, and amenable to the process of the Court; and it was urged that he himself should be sworn, and his declarations be not received. But he is privy in estate, and in law, his declarations are those of the party claiming under him. If it be asked, Why not swear him? the answer is, the party likes his declarations better. It is true, if he be now disinterested, either party may, if he chose, call him as a witness.

This was an action of trover to recover the value of a negro slave named Peter, to whom both Plaintiff and Defendant set up title, under Joseph Hall. The Plaintiff gave in evidence a bill of sale made to him by Joseph Hall on the 15th December, 1817; and the Defendant gave in evidence a bill of sale made to him by Joseph Hall on the 5th of that month. It was alleged by the Plaintiff, that he had purchased the negro Peter from Joseph Hall before the 5th of December, (151) and that it was agreed between them at the time of the sale and purchase, that they should meet on or about the 15th of December, when Plaintiff should give bond with security for the purchase money, and Joseph Hall should execute to him a bill of sale: and to prove this fact, he offered in evidence, among other things, the declarations of Joseph Hall made between the 5th and 15th of December. Hall was alive and amenable to the process of the Court. The evidence was rejected, and the Plaintiff nonsuited. A rule for a new trial was obtained, upon the ground that the evidence was improperly rejected. This rule was sent to this Court, and

HENDERSON, Judge, delivered the opinion of the Court:

The declarations or confessions of the person making them, are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary, is not supposed to make a statement less favorable to himself than the truth will warrant: at least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is therefore evidence *against him*, and his subsequent purchaser stands in his situation; for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions. During the time that Lord Mansfield presided in the English Courts, a different rule prevailed, that no man should be heard either directly himself as a witness, by giving his declarations in evidence to impeach an instrument to which he was a party, or to invalidate a title which he had passed away as a good one: thereby forming a new rule of excluding witnesses. But the good sense of his successor restored the ancient rule, declaring that he knew of but two rules of exclusion, infamy and interest: and the rule observed in Lord Mansfield's time is now entirely exploded, except in some of our sister States, where it is retained as to instruments which are negotiable.

(152) But it is said, that the person whose declarations are offered, is entirely disinterested and within the process of the Court, and therefore should himself be sworn. There would be some weight in this objection, if they were offered as the declarations of a disinterested individual in those cases where such declarations are admissible, to wit, in cases of pedigree and boundary; for then the declarations would be inadmissible, if the higher evidence, the oath of the party, could be had. In all other cases, except those of pedigree and boundary, the declarations of disinterested individuals are inadmissible; for they are nothing but hearsay. In this case, they are offered as coming from a *Privy in Estate*, and therefore, *in Law*, from the party himself; for the privy completely represents him, so that the question whether the person be now disinterested to declare

the truth, and is amenable to the process of the Court, does not affect the point now under consideration.

It is asked, Why not swear him? The answer is, The party likes his declarations better. He may, from some motive, vary his statement; and the party offering this evidence is alone to judge It is true, if he be now disinterested, either party may, *if he choose*, call him as a witness. The evidence was improperly rejected, and the rule for a new trial must be made absolute.

(153) THE STATE *v.* JOHN WITHEROW.

From Rutherford.

On a conviction for perjury in Rutherford County two reasons were assigned in arrest of judgment. 1st. That the indictment did not charge that the oath was taken in Rutherford County. 2d. Nor that the evidence was given to the Court, or the Court and Jury, but to the Jury only.

The first reason overruled, for the indictment charges "that he the said A. B. on the 16th April, in the year aforesaid, in the county aforesaid, came before the said C. D. Judge as aforesaid, and then and there before the said C. D. did take his corporal oath." The part of the indictment immediately preceding, states that C. D. held the Court as Judge, at that term, in Rutherford County: the same County is inserted in the caption of the indictment, and there is none other mentioned in any part of it. The words "then and there" refer to the 16th April and to the County of Rutherford.

The second reason overruled, for the indictment charges that the oath was taken before the Judge, and the evidence was thereupon given to the Jurors. This is the proper way of stating the oath, 1st Because evidence given was on an issue to be tried by a Jury. 2d. It is agreeable to the most approved forms of indictments for perjury committed on the trial of an issue.

The oath is taken before the Court, but the evidence is given to the Jury, and the crime consists in giving false evidence to them in a material point in issue.

This was an indictment for perjury, and so much of the indictment as relates to the points decided in this case was as follows, to-wit:

"STATE OF NORTH CAROLINA—Rutherford County.

"Superior Court of Law, third Monday after the fourth Monday of September, 1817.

"The Jurors for the State upon their oath present, that at a Superior Court of Law opened and held for the County of Rutherford, on the third Monday after the fourth Monday of March, in the year of our Lord one thousand eight hundred and sixteen, there was a case which came on to be tried between the State of North-Carolina and John Oliver, Plaintiffs, and Elijah Patton, Defendant, in an action of debt to recover the penalty of forty pounds of the said Defendant, for having loaned a sum of forty dollars by said Defendant, to one John Witherow, and for having received more than the legal interest thereon by the said Elijah Patton from the said John Witherow; and the said Elijah Patton before the term last above mentioned, did plead that he owed nothing (154) to the Plaintiffs in said suit: Whereupon the same issue came on to be tried at the term last above mentioned, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and sixteen aforesaid, before the Honorable Duncan Cameron, then being one of the Judges of the Superior Courts of Law in and for the State of North-Carolina, and then and there having competent power to hold said Superior Court in the County of Rutherford aforesaid, and to try causes therein, and also a Jury of good and lawful men, then and there sworn to try the issue aforesaid, between the said State of North-Carolina and John Oliver, Plaintiffs, and the said Elijah Patton, Defendant. And the Jurors aforesaid, upon their oath aforesaid, do further present, that John Witherow, of the County of Rutherford, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, and contriving and intending unjustly to aggrieve the said Elijah Patton, the Defendant above named, and wickedly to procure a verdict to go against him for the penalty of forty pounds aforesaid, on the issue so joined as aforesaid, he the said John Witherow, on the sixteenth day of April, in the year aforesaid, in the County aforesaid, came before the said Duncan Cameron, Judge as aforesaid, and then and there before the said Duncan Cameron, he the said John Witherow, did take his corporal oath upon the Holy Gospel of God, to speak the truth, the whole truth, and nothing but the truth, of and upon the premises in the said issue so joined as aforesaid, the said Duncan Cameron, Judge as aforesaid, then and there having competent power and authority to administer said oath to the said John Witherow in that behalf, and the said John Witherow so being sworn as aforesaid, falsely, corruptly, wilfully, wittingly, knowingly and maliciously, did say, depose and give in evidence to the Jurors of said Jury, so as aforesaid taken between the parties aforesaid, in substance and to the effect following, &c."

The defendant was convicted, and two reasons were assigned in arrest of judgment. 1st. That it is not stated that the oath was taken in Rutherford County. 2d. That it is not charged that the evidence was given to the Court, or to the Court and Jury, but to the Jury only. These reasons were overruled, and the Defendant appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The first reason is answered by the statement in the indictment, which charges the Defendant with taking the oath, "he the said John Witherow, on the 16th day of April, in the year aforesaid, in the County aforesaid, came before the (155) said Duncan Cameron, Judge as aforesaid, and then and there before the said Duncan Cameron, he the said John Witherow, did take his corporal oath, &c." The part of the indictment immediately preceding, states that the same Judge held the Court that term in Rutherford County: the same County is inserted in the caption of the indictment, and there is none other mentioned in any part of it. The words "then and there," must consequently refer to the 16th day of April and to the County of Rutherford.

With respect to the second reason: the indictment, after stating that the oath was taken before the Judge, he having competent power to administer the same, proceeds to charge that the Defendant did depose and give evidence to the Jurors. This way of stating the oath is the proper one; 1st. Because the evidence given was on an issue joined between the parties in the suit; and it is called evidence, because thereby the point in issue is to be made evident to the Jury. 1 Inst. 283. 2d. It is agreeable to the most approved forms of indictments for perjury committed on the trial of an issue. The oath is taken before the Court, but the evidence is given to the Jury; and the crime consists in giving false evidence to them in a material point in issue. It is the exclusive province of the Jury to decide upon the facts in issue, and therefore the evidence is given to them to enable them to decide. Whence it follows, that the charge in the indictment is true in point of fact, as well as technically correct. 4 Wentw. 273. The reasons in arrest must be overruled.

(156)

Den on demise of JAMES WHITTED and ATTILIA his wife *v.* SAMUEL WILLIAMS.

From Franklin.

A. devised his lands to his son Henry, his daughter Peggy, and the child his wife was then ensient with, as tenants in common; and declared that on the coming of age of his son Henry, it should be at his option to have the land sold or not: if sold, the money arising therefrom was to be equally divided between him and the other two children: and the executor was authorized to sell the lands, if Henry should wish it, and divide the money.

A. died in 1793, and his wife soon afterwards was delivered of a daughter, who shortly thereafter died. The widow married, and had issue, a daughter named Attilia. Peggy died in May, 1796, and Attilia was born in September following. Henry, on arriving at age in 1807, sold the land; Attilia now claimed one-fourth part of the lands, and brought an ejectment against Henry's alienee. Pending the suit, the executor executed a conveyance to Henry's alienee.

Attilia is not entitled to recover *any part of the lands*, whatever right she may have to a share of the money for which they were sold; nor can the Court in this action take any notice of her claim for a share of the rents which accrued before the sale.

The Court here would direct the Defendant to pay the costs of this suit, if a question upon that point had been submitted; but, as it is not submitted by the case sent up, no decision here can be made on it.

This was an action of ejectment brought to try the title which the lessors of the Plaintiff claimed to one undivided fourth part of a tract of land situate in Franklin county. John Kinchen, being seized of the land, made and published, in writing, his last will duly executed to pass his real estates, and therein devised the land in question "to his son Henry Martin Kinchen, his daughter Peggy Kinchen, and the child his wife was then ensient with, as tenants in common; and declared that on the coming of age of his son Henry Martin, it should be at his option to have the land sold or not; if sold, the money arising therefrom was to be equally divided between him and the other two children; and the executors were empowered to sell the land, if Henry Martin (157) should wish it, and to divide the money." John Kinchen died in December, 1793, and shortly after his death his widow was delivered of a child, who was named Lucretia, and who soon thereafter died The widow then intermarried with William Nash, by whom she had issue, Attilia, wife of the lessor of the Plaintiff. Peggy Kinchen died on the 9th of May, 1796, and Attilia Nash was born in September following. The third of the land to which Lucretia was entitled under the demise, having upon her death become vested in Henry Martin and Peggy, James Whitted now claimed upon the death of Peggy one-fourth of the land, in right of his wife Attilia, as one of the heirs at law of Peggy Kinchen; and also claimed one-fourth part of the rents which had accrued since Peggy's death.

Henry Martin Kinchen, on arriving at age, conveyed the land to the Defendant on the 29th August, 1807, and the executor of John Kinchen executed a conveyance to the Defendant after the bringing of this suit. It was submitted to the Court to decide whether the lessors of the Plaintiff be entitled to recover.

HALL, Judge, delivered the opinion of the Court:

In this action the Court cannot decide the claim which the lessors of the Plaintiff set up for a share of the rents; and as to the claim which they set up for one-fourth part of the land, the Court must give judgment for the Defendant. The testator directed his executor to sell his land, if his son Henry Martin, on his arrival at age, should wish it. The acting executor has conveyed the land to the Defendant, in conformity with the wishes of Henry Martin after his arrival to age. The Defendant, therefore, holds the lands under the will of John Kinchen, the devisor, who was the rightful owner of them, and the Plaintiffs cannot recover them, nor any part of them. Whether they be entitled to any part of the money for which the land was sold, will be decided when the question shall be properly submitted to the Court. It cannot be decided in this action of ejectment. It is (158) said, in the argument, that as the deed was made to the Defendant since the institution of this suit, the Plaintiff is entitled to damages for the trespass, although he cannot recover the land. This Court would, no doubt, so decide, were that point submitted; but, as it is not submitted, we cannot undertake to decide it.

(159)

The Administrator of R. STALLINGS *v.* the Executors of GARRETT GOODLOE, and the Executors of GARRETT GOODLOE *v.* the Administrator of R. STALLINGS.

From New Hanover.

Rules concerning bills of review. It is provided by the third of Lord Bacon's Ordinances, that no bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that they be brought in: and so in other cases which stand upon the strength of the decree alone.

His fourth ordinance provides that if any act be decreed to be done, which extinguishes the party's right at the common law, as making an assurance or relief, acknowledging satisfaction, cancelling bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined: but such sparing is to be warranted by public order made in Court.

Peculiar circumstances have induced the Court to make exceptions to the rigid enforcement of the third ordinance: as,

1. Where the party would swear that he was unable to perform the decree, and submit to lie in prison until the matter was determined on the bill of review.
2. Where the party had been in prison for twenty years, and swore that he was not worth forty pounds sterling, besides the matter in question, he was allowed to bring a bill of review, without paying the costs decreed in the original case.
3. Where a large sum of money was decreed to be paid, the Court permitted the party to bring a bill of review on giving good security to perform the former decree.

Thus far the Courts have gone in England. In this State, a party has been allowed to bring a bill of review upon its being shewn to the Court that he was insolvent.

The Courts here will adopt the mild rule, where the party is able to perform the decree, of permitting him to bring a bill of review upon his

making secure the party who obtained the decree. This rule will best comport with the condition of our country and our mode of doing business in Courts of Equity.

The facts in this case are set forth in the following opinion of the Court, delivered by

TAYLOR, Chief Justice: The two cases between (160) these parties are branches of the same transaction, of which I have endeavored to form a connected view by looking into the whole of the record, and extracting from it a statement upon which the judgment of the Court must be given.

Garrett Goodloe was appointed guardian to Riddick Stallings, a minor, who died soon after he came of age, when Shadrach Stallings administered upon his estate, and petitioned against the executors of Garrett for an account and settlement of the guardianship, about sixteen years ago. The executors answered. A reference was made to the Master, whose report was set aside: a second reference was made, and, no exceptions being taken to the report, a decree was made conformably to it at October term, 1814, for the sum of $1,209.

The executors then obtained an injunction, which was dissolved on the coming in of the answer, in the Court of Equity for New Hanover, and the decree of dissolution was afterwards confirmed in this Court. The executors in April, 1817, filed a petition to review the decree, to which the administrator of Riddick Stallings pleaded, that the decree had not been performed; and that case, upon the sufficiency of the plea, was transmitted to this Court, and is one of the two cases now pending here between the parties.

In the mean time, execution issued against the executors, who, in March, 1818, obtained a supersedeas from a Judge, upon an affidavit which stated, in substance, the same facts which formed the ground of the petition to review. Shadrach Stallings, the administrator, met this with a counter affidavit, and a motion to dismiss the supersedeas: or if it should be continued, an order that the executor should give security for the payment of the judgment, or that the property levied upon should be forthcoming in the event of the supersedeas being dismissed. The motion to dismiss the supersedeas, and for the security, was directed to be sent here; and that forms the second case.

(161) There is nominally a third case on the docket between the parties; but it is in reality a part of the

first, being an assignment of the errors on which the executors allege the decree ought to be reversed.

It appears to me that a decision on the plea must unavoidably decide the question on the supersedeas; for if the plea be sustained, the amount of the decree must be paid by the executors, and the administrator is entitled to the effect of his execution. On the contrary, if the plea be overruled, the supersedeas must be continued; in which event, it will be necessary to dispose of the other motion made by the administrator in relation to security. I shall therefore proceed to consider the plea.

The jurisdiction concerning orphans' estates was vested in the County and Superior Courts, to avoid the delay and expense incident to an application to the Court of Chancery, which was then held in one place only by the Governor and Council. But it is evident from the law introducing this change, that the power of the County and Superior Courts was intended to be concurrent with that of the Chancery, the forms of practice in which were to be observed in all cases where no change was made by the act. This appears from the preamble of the act of 1762, ch. 5, from the 23d and 24th sections, and from its general scope.

In the third of Lord Bacon's ordinances (2 Bac. Works, 239), which were made nearly two hundred years ago, it is provided that no bill of review should be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed; as, if it be for land, that the possession be yielded; if it be for money, that money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. The fourth ordinance makes an exception of those acts which extinguish a party's rights at common law; such as making an assurance, or release, or the like; these are to be stayed till the hearing.

It has been said by Lord Hardwicke (3 Atk. 35), (162) that these rules have never been departed from: But in Williams *v.* Mellish (1 Vern. 117), the proceedings were offered to be stayed on a bill of review, if the Plaintiff would swear that he was unable to perform the decree, and would lie in prison till the matter was determined on the bill of review. And in a subsequent case, the Plaintiff was allowed to bring a bill of review, without paying the costs of the original cause, upon making oath he was not worth 40*l.* besides the matter in question. Id. 264. In Levil *v.* Darcy (1 Cham. Cas 42), the rule of the Court was pleaded to a bill of review, that the Plaintiff ought first to have brought the money into Court; but the Court said they would dispense with the rule upon his giving good security. These cases seem to shew the present practice in the Court of Chancery in England, and it follows from them, that the rule may be dispensed with under the circumstances of each case; that the decree must either be performed, security given for its performance, or the party must swear he is unable to do either, and surrender himself to jail till the bill of review be determined. But I am inclined to think, that an order for security is made only under peculiar circumstances, as it is not noticed as a distinct exception to the rule in the modern books of practice; and in the only case where I can find it was made, the decree was for a large sum of money.

It is not easy to say what the practice has been in this State; from the imperfect organization of the Equity Courts, they can scarcely be said to have acquired any fixed and stable rule of practice. In Spiller's case, a motion to suspend the proceedings in an original cause was made, on filing a bill of review, but overruled by the Court, who admitted the rule as it is transmitted by Lord Bacon; and this decision was subsequently recognised in the case of Kenon's executors *v.* Williamson. 1 Hayw. 350 In the case of Pannell and Wife *v.* Taylor decided in this Court, the party was allowed to proceed with a bill of review, upon its
(163) being shewn that he was insolvent. The rule which shall be established in this case, will probably regulate the practice in future; and upon a consideration of the state of society among us, and the mode of transacting affairs, influenced more by the periodical returns of agricultural gain, than the constant circulation of commercial profit; the hasty manner in which Equity business has been done; and the genius of our government, which should oppose no harsh, and frequently insuperable obstacles to the administration of justice, I am disposed to think the milder rule will be the most just one; and that if the party obtaining the decree is rendered secure in the event of a dismission of the bill of review, the inconvenience will be small, compared with that which will flow from the denial of justice, which a rigorous exaction of the money will in many cases occasion. It will correspond too with the ordinary practice in writs of error

and appeals, and all other means by which errors of fact or law are reviewed. I am, therefore, of opinion, that upon the executors of Garrett Goodloe giving bond with security, conditioned to prosecute the bill of review, they may proceed with it, in the discretion of the presiding Judge: and that the plea in this case be overruled, but without costs: that the supersedeas be continued until the next term of New-Hanover Superior Court, when it ought to be dismissed.*

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* GASTON argued this case for the administrator of R. Stallings; and it being a case which presented to the Court an opportunity of settling a rule of practice relative to bills of review, which should suit the condition and convenience of our country, the Court invited a full argument and gave to the case much consideration.

Gaston argued, that no bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed. As, if for land, that the possession be yielded; if for money, that the money be paid; if it be for evidences, that they be brought in; and so in other cases which stand upon the strength of the decree alone. Ld. Bacon Ord. 3. 2 Bacon's Works 239. Hinde 59.

But if any act be decreed to be done, which extinguishes the party's right at the common law, as making of an assurance or release, acknowledging satisfaction, canceling bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined, but such sparing is to be warranted by public order made in Court. Ld. Bacon Ord 4. Hinde 59 These rules, established by Lord Bacon, have never been departed from since the making of them. 3 Atk. 35.

The Plaintiff must perform the decree in all cases wherein the Court can set him in as good a state as he was, in case the first decree happen to be reversed. Toth. 42. Prac. Reg. 52, Hinde 59. And in the case of Milton *v.* Macclesfield (2 Freeman 88. Hinde 50), the Court said that in a bill of review all things are to be performed according to the former decree, that do not extinguish the right, otherwise the non-performance is a good plea in bar: as, if writings are to be brought into Court, or costs paid; but not to release the right or make a conveyance, because that would destroy the right.

It is true there is a case to be found in 1 Ch. Cas. 42, which is noted in Hinde 59, and in the Practical Register, 52, in which the Court permitted the Plaintiff on a bill of review, to proceed, on giving good security to satisfy the former decree. But probably there were some peculiar circumstances in the case, the note which we have of it being very imperfect; for in the case of Williams *v.* Mellish (1 Vern. 117), the Lord Keeper would not allow a bill of review without satisfying the former decree, except the Plaintiff would swear he was unable to do it, and surrender himself to the Fleet till the matter in the bill of review was determined.

In another case (1 Vern. 264, Hinde 62) Milton *v.* Macclesfield, the Lord Keeper allowed the Plaintiff to bring a bill of review, without paying the costs decreed in the original case, he having been in prison twenty years, and having made oath that he was not worth 40*l.* besides the matter in question. But in this case, it was objected that the order for thus dispensing with the costs, should have been set forth in the bill of review.

A supplemental bill in the nature of a bill of review, agrees in every

(164)

Den on demise of THOS. MIDFORD and wife *v.* HODGE HARDISON.

From Martin.

As an adverse possession alone will not take away a right of entry, it shall not have this effect when under a title which is common to the Plaintiff and Defendant; the intendment of law being in such case, that the Defendant's entry was for the benefit of all entitled as co-heirs.

Where both parties claim by descent from the same common ancestor, a color of title, by virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case.

Ezekiel Moore, being seized of the land in question, devised the same before the year 1784 "to his three daughters, Rosanna, Celia and Elizabeth, and their heirs, share (165) and share alike." These daughters were his only children. Celia died since 1784, intestate and without issue; Elizabeth also died intestate and without issue, but whether before or since 1784 did not appear. The widow of Ezekiel Moore, the testator, intermarried with —— Collins, by whom she had issue the wife of Thomas Midford, the lessor of the Plaintiff. Rosanna Moore, who survived her sisters Celia and Elizabeth, entered upon the land, claiming it adversely to all persons, and put into possession thereof the present Defendant as her tenant, who had more than seven years' possession before the institution of this suit. The Jury found a verdict for the defendant; and a rule for a new trial being obtained, upon the grounds, 1st. That the possession was without color of title; and 2d, That as between co-heirs, the possession of one shall not be deemed adverse to that of another. The case was sent to this Court.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

This case arises upon a will made before the year 1784, by which the testator devised the land to his three daughters, Rosanna, Celia and Elizabeth, his only children, to be equally divided between them and their heirs, share and share alike. That these words created a tenancy in common, and that the daughters took by a purchase under the will,

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respect with a bill of review, except that it is used where the bill has not been signed and enrolled. Cowper's Equity Pleadings, 89.

The jurisdiction over these subjects given to the Courts of Law by the act of 1762, ch. 5, is concurrent with that of the Chancery: their forms of proceeding are analogous, and the rules of the latter, of course, when applicable, ought to govern the former.

will not admit of any doubt. Com. Dig. Assets B. 4 Cruise, 147, Powell on Devises, 440.

It follows that, upon the death of one since 1795, (166) her share would descend to her brothers and sisters of the half blood, as well as the whole blood, to those on the maternal side, as well as those on the paternal side, and whether they were born since the death of such sister or before it. The descent upon Rosanna of the share of either of her sisters, cannot amount to a color of title, so as to make her seven years' possession bar the entry of the Plaintiff's lessor, because such title was claimed in common, and was not adverse. As an adverse possession alone will not take away a right of entry, neither will it, when under a title which is common to the Plaintiff and Defendant; the intendment of law being in such case, that the Defendant's entry was for the benefit of all entitled as co-heirs. Where both parties claim by descent from the same common ancestor, a color of title by virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case, which the Court does not decide. Let the rule for a new trial be made absolute.

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(167)

DANIEL KILLIAN and wife v. JOHN WATT.

From Iredell.

Assumpsit by husband and wife for services rendered by the wife before marriage. Statute of limitations pleaded, and the coverture of the wife replied. The wife had served the Defendant for four years, without making any contract in express terms for compensation. The service continued until the marriage, at which time she was more than twenty-one years of age, and no settlement took place between her and the Defendant. More than three years expired after the marriage before the bringing of the suit. The statute bars the action; for in whatever way the hiring be considered, the cause of action accrued to the wife before marriage, and her subsequent coverture could not stop the running of the statute.

If the hiring was from year to year, then the year's service ought to have been completed, before any right of action could accrue. If before the end of the year the contract had been altered, so that the services were to be paid for *pro rata*, the wife was then sole and of full age. If the contract might be put an end to at the option of either party, the wife put an end to it by the marriage, andat that time she was of full age. Upon the first supposition, no cause of action for the last year ever existed: upon the two last, acause of action accrued to a person who was under no disability, and more than three years have elapsed since it did accrue.

This was an action of assumpsit, brought by the Plaintiff and his wife, to recover compensation for services rendered by the latter, and a negro girl belonging to her, to the Defendant. The statute of limitations was pleaded, to which the coverture of the wife was replied. It appeared in evidence, that Killian's wife and her negro girl, had served the Defendant four years without making any contract in express terms for compensation. The service continued until the marriage, at which period, Mary Killian was more than twenty-one years of age, and no settlement took place between the parties. The marriage was celebrated at the house of the Defendant, where Mary Killian at that time resided. More than three years had expired after the marriage before the bringing of this action. The Court instructed the Jury that the hiring must be considered (168) as a hiring from year to year, and that the statute of limitations had run upon the three first years. That as to the last year, if the marriage took place within the year, or before its expiration, the Plaintiff could not recover, unless his wife quit the service with the Defendant's consent; but if that year's service were complete, even for a day, the statute had began to run, and consequently barred the Plaintiff. The Jury found for the Defendant, and the Plaintiff moved for a new trial, on the ground, that although the cause had been once tried in the county, and once in the Superior Court, the point as to its being a hiring from year to year, had not been made by the Defendant, but was raised for the first time by the Judge in his charge to the Jury—That the Plaintiff was thereby surprised, and an opportunity should be afforded to him of shewing what was the true character of the hiring. The motion for a new trial was sent to this Court, and

TAYLOR, Chief-Justice, delivered the opinion of the Court: If the cause of action had accrued to the wife after she came of age, and before her marriage, the statute began to run, and the subsequent coverture could not stop it. No deduction can be made from the facts in this case, which will, in point of law, entitle the Plaintiff to a new trial. For if the hiring was from year to year, and nothing was positively agreed on between the parties, then the year's service ought to have been completed before any right of action could accrue to the Plaintiff's wife. But if such a contract had been made, and before the end of the year, put an end by the consent of the parties, and a new one made, by which the services were to be paid for *pro rata*, the wife was then of full age and sole. If the contract might be put an end to at the option of either party, the wife put an end to it by the marriage, and at that time she was of full age. Upon the first supposition, no cause of action for the last year ever existed. Upon the two last, a cause of (169) action accrued to a person who, at the time, was under no disability; and more than three years have elapsed since it did accrue. So that whichever way it be viewed, the verdict was right. The rule for a new trial must be discharged.

JACOB HOOVER *v.* JOHN CLARK'S ADMINISTRATORS.

From Randolph.

Action of covenant on a deed, in which the Defendant set forth "that in consideration of 44*l.* to him paid, he had sold to the Plaintiff a note of hand upon John Arnold for 50*l.* given by him to one Macshan: And if there should any thing fail in the recovery of the note, or if Arnold should pay it in paper money without allowing the depreciation, then and in that case, the Defendant obliged himself to make the same good to the Plaintiff; or if Arnold should be allowed a receipt by one Dix to him for 18*l.* the Defendant obliged himself to make it good."

This covenant extends to the solvency of Arnold, and the object of it was to secure the Plaintiff against his insolvency, the allowance of the depreciation and the receipt of Dix.

The words "if any thing should fail in the recovery of the said note," point to a complete indemnity to the Plaintiff, if from any cause he should not receive the amount of the note: they mean not only that a judgment should be obtained, but that the money should be paid.

A "recovery" signifies, in legal contemplation, the obtaining of any thing by judgment or trial at law.

This was an action covenant brought to recover damages for a breach of the covenants contained in the following deed, to-wit:

"Know all men by these presents, that I, John Clark, of Randolph County, and State of North Carolina, for and in consideration of the sum of forty-four pounds, hard money, to me in hand paid, by Jacob Hoover, have bargained and sold him one note of hand upon John Arnold, Esq., given by him to Nehemiah Macshan, for fifty pounds, Virginia money; now if there should any thing fail in the recovery of the said note, or if the said John Arnold should pay the said note with paper money, without allowing the depreciation, then and in that case, I do oblige myself to make the same good to the said Hoover; or if the said John (170) should be allowed a receipt given by William Dix to him for eighteen pounds, paper money, I also oblige myself to make it good. Witness my hand and seal, this 11th day of April, 1793.

JOHN CLARK. [SEAL.]"

The declaration assigned for breaches, 1st, That Jacob Hoover, (without his default) did entirely and absolutely fail in the recovery of the said note, or any part thereof, from John Arnold; and that John Clark had not, although often requested, made the same good to him, nor indemnified him for the loss which he had sustained thereby. 2. That upon a settlement with John Arnold, he was obliged to allow, and did allow to Arnold, the receipt given by William Dix to Arnold for eighteen pounds, paper money, which Clark, although requested, had not made good to Hoover.

Upon the trial, the Court non-suited the Plaintiff, on the ground that the covenant did not extend to the solvency of Arnold, but only that a judgment should be obtained; that the depreciation should be allowed, and that the receipt of Dix should not be available. A rule for a new trial being obtained, it was sent to this Court.

TAYLOR, Chief Justice, delivered the opinion of the Court: The words in the covenant declared on are, "now if any thing should fail in the recovery of the said note, or if the said Arnold should pay the same in paper money, without allowing the depreciation, then and in that case, I do oblige myself to make the same good to the said Hoover: or if the said Arnold should be allowed a receipt given by William Dix to him, for eighteen pounds, paper money, I do oblige myself to make it good." If words might have been selected to express more clearly the intent of Clark, to secure the Plaintiff against the insolvency of Arnold in relation to the note, yet such intention may be fairly inferred from the terms employed. It would seem strange that the parties should provide against the depreciation of the money, by an undertaking of Clark's to make it good, and yet the Plaintiffs be content to take the risk of Arnold's inability to pay
(171) any part of the sum. The undertaking respecting
the receipt of Dix, admits of the same observation, and would, under any other construction than that contended for by the Plaintiff, betray a strange caution and anxiety as to the parts of a sum intended to be secured, when the whole is left at risk. But the words "if any thing should fail in the recovery of the said note," point to a complete indemnity to be afforded to the Plaintiff, if from any cause he should not receive the amount. A judgment is of no more value than a note, and a covenant that a judgment shall be recovered, seems an useless undertaking, unless it be also meant

that the money shall be paid. If Clark had undertaken simply for the recovery, without any thing more, the legal construction would have been, not only that a judgment should be obtained, but that the money should be paid. But he has not merely stipulated for the recovery of the judgment, but of the note. A recovery signifies, in legal contemplation, the obtaining of any thing by judgment or trial at law. Coke Litt. 154. The recovery of the note must, therefore, signify the obtaining of the money due upon it, by means of a judgment. In my view of the covenant, the apparent intention of the parties is borne out by a technical interpretation, in which all the words are satisfied by an effective meaning. The non-suit must be set aside.

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(172) OBED WOOD *v.* THE EXECUTORS OF JOSIAH WOOD.

From Pitt.

Money betted on a horse-race is deposited with a stake-holder to be delivered by him to the winner of the race. The stake-holder pays over the money, after notice from the loser of the race not to do so. The loser is entitled to recover the money from the stake-holder—for

The act of 1810, ch. 14, declares, "that every promise, agreement, note, bill, bond, or other contract, to pay, deliver, or secure money or other thing, won or obtained by wagering or betting on horse-race, or to pay or secure money or other thing, lent or advanced for that purpose, shall be void."

In all cases of this sort, the equity is, Who has the money? Is it in the hands of the party to the illegal transaction? Or is it in the hands of a person not a party? If in the hands of a party, the money cannot be recovered, provided it were paid to him by the consent of the other party; because both parties are equally criminal, and there can be no reason why he who parted with his money voluntarily, shall have it back. To his case both maxims apply, "*In pari delicto melior est conditio possidentis.*" And "*Volenti non fit injuria.*"

But if the money be in the hands of the stake-holder, or he has paid it over after notice not to do it, the person who made the deposit, shall recover it back; for as in the first case, the party who has voluntarily paid over the money, cannot rest his claim to recover it upon a moral foundation, so in this, the stake-holder cannot rest his claim to retain it upon a moral foundation. Between him and the party making the deposit, there is no moral turpitude, and while the money remains in his hands, it belongs to the party that lodged it there.

In an illegal transaction, money may always be estopped whilst *in transitu* to the party entitled under such illegal transaction.

In October, 1817, the Plaintiff and one Causey agreed to run a quarter race for an hundred dollars. The money was deposited in the hands of the Defendant's testator, as a stakeholder. The race was run, and the horse of Causey came out ahead; but the Plaintiff alleged the race was not fairly run, and forbade the stake-holder from paying over to Causey, the money. He tendered to Causey a bond with security to keep him indemnified, and demanded the return of his deposit. The stake holder paid over the money to (173) Causey after receiving the notice, and this suit was brought to recover the amount of the Plaintiff's stake. The Judge before whom this case was tried, charged the Jury, that it was necessary for the Plaintiff to prove only, that the stake-holder was forbidden to pay over the money to Causey, and that the Plaintiff demanded his deposit: that as to the fairness or unfairness of the race, it was entirely immaterial. The Jury found a verdict for the Plaintiff, and a rule for a new trial was obtained upon the ground of misdirection by the Court. This rule being discharged, the Defendant appealed to this Court.

Gaston, for the Plaintiff. If money be deposited with an agent, with instructions in the happening of a certain event, to pay it over to a third person, and there be no contract between the depositor and such third person, such money may be reclaimed after the happening of the event, and before it be paid over. The property is not changed; and the principal, before it is changed, can certainly countermand his orders.

If, therefore, A and B, severally and without any concert or privity, deposit sums of money with C, with instructions on the happening of a certain event, to pay A's money to B, and on the happening of an opposite event, to pay B's money to A, either, while the money is in the hands of C, can change his mind and re-demand his own. But if a contract had been made between A and B to that effect, in which the act of each was in consequence of the act of the other, and such contract was valid, then accordingly as the event should turn out, one or the other would have a right to the money deposited. The depository, with a knowledge of this contract, and of the event, would be bound in good faith to deliver the money according to the right. It would be money in his hands, belonging to the successful person, and which had been received to his use.

It is clear, then, that the extinction of the right to reclaim what has been deposited, is in consequence of the contract (174) between the parties. By that contract a new right is acquired, which is in consistence with the continuance of a dominion over the deposit in the former proprietor. If no such contract had been made, the stake, notwithstanding the event, was the money of him who staked it. Until paid, he could take it back; if paid, he could not, for then it became a gift: and, though no promise to give is binding, yet an actual gift is a valid transfer of property.

The Legislature has, for public purposes, denied to certain contracts all legal obligation, and declared them utterly void. "Every provision, agreement, or other contract to pay, deliver or secure money, won by wagering on a horse-race, &c. shall be and is hereby declared void." To say that such an agreement could give any rights, or take away any rights, would be to declare it operative and binding. Of course, money deposited on such an agreement, remains the property of the depositor, precisely as though no such agreement had been made.

This view is corroborated by a recurrence to judicial decisions. In the case of Lowrig *v.* Bourdieu, Doug. 467, it was held, that he who pays money voluntarily, cannot reclaim it; and in Andrie *v.* Fletcher, 2 Term, 162, 3 do. 266, it was held, that where a man pays money upon a contract which is void, and which therefore gives no right, the holder might retain it, though without consideration. It is true, in those cases the decisions rested, in part, on a principle of policy. The contracts were disapproved of by the law, which would lend to neither party aid against the other.

In Sullivan *v.* Greaves, Park. 8, it was said, that where the contract is invalid and void, A shall not recover from a stake-holder what B has put into his hands. The fact of that case did not, perhaps, authorise the adoption of a principle in all its latitude; because the Defendant was not, in fact a stake-holder, but a mere agent or receiver for the Plaintiff. Tenant *v.* Elliot, 1 Pos. and Pull. 3—Remarks of Cockell, Seargant, and Heath, Justice, in Id. 297–9.

In Cotton *v.* Thurland (5 Term 405), Lord Kenyon (175) lays down the principle, that while the money remains in the stake-holder's hands, it belongs to the party that lodged it there, and this decision was frequently recognised afterwards in the King's Bench. 7 Term 535. 8 do. 575.

In Edgar *v.* Fowler (3 East. 222) and Taylor *v.* Lindey (9

East. 49), it was held, that in illegal transactions, money may always be stopped while *in transitu* to the person entitled under such transaction, to receive it. The same principle is laid down in Vischer *v.* Yates. 11 Johns. 23.

And in Smith *v.* Bickmore (12 Id. 1) it was held, that a person who deposits in the hands of a stakeholder, a sum as a wager on the event of a boxing-match between himself and another, may, after committing a breach of the peace by fighting, recover back his deposit from the stake-holder, having demanded it before it was paid over.

Taylor, Chief-Justice, delivered the opinion of the Court:

This action was brought to recover the amount of a sum betted on a horse-race, and deposited with the Defendant's testator as a stake-holder. The sum was paid over by him to the supposed winner of the race, after notice from the Plaintiff not to do so: and the contract being illegal under the act of 1810, the question is, Ought the Plaintiff to recover? Where money has been paid on an illegal transaction, in which both parties are equally criminal, it cannot be recovered back; for there is no reason why he who parted with his money freely, should have it again. *Volenti non fit injuria:* and the law in such case esteems the condition of the Defendant, the most eligible, not on account of any superior merit he has to the plaintiff, but because the latter cannot build his claim on a moral foundation. This principle is distinctly recognised in many cases, and recently in Hauser *v.* Hancock (8 Term 575) and Edgar and another *v.* Fowler and another. 3 East. 222. And the first case also proves, (176) that where money, deposited on an illegal wager, has been paid over to the winner by the consent of the loser, the latter cannot afterwards maintain an action against the former, to recover back his deposit. But the law is different where the action is brought against a stake-holder who has the money still in his possession, or has paid it over after notice not to do so. The distinction is taken in Cotton *v.* Thurland (5 Term 405), where the Plaintiff was permitted to recover a stake deposited by him on the event of a boxing-match; and the latter case does not stand unsupported, for its authority has been admitted and confirmed in a recent case of Smith *v.* Bickmore (4 Taunt. 477); which was an action brought by a person who deposited in the hands of a stake-holder, a sum of money, as a wager on the event of a boxing-match, between himself and another: and he was allowed to recover the same from the stake-holder, having demanded it before it was paid over. In that case, Sir James Mansfield observes, "The law is got into sad confusion by contradictory decisions respecting illegal contracts. But this case seems made for the express purpose of confirming *Cotton* v. *Thurland.* In that case, there was a doubt about the event, exactly as in this case; and the Court thought the money might be recovered against the stake-holder. Now this is a case, not of an action against one of the parties to the wager, but against a stake-holder; therefore it is different from the cases of actions against underwriters to recover back premiums paid on illegal contracts. Whatever may be the illegality of the contract, the stake-holder is no party to it, and as long as the money remains in his hands, he ought to be accountable to some one for it: there can be no justice in his claim of detaining it. The question between a party and the stake-holder, is susceptible of views and considerations, which do not attach to it between the parties themselves. To both of the latter the law refuses its aid, on principles of public policy: It cannot uphold the (177) winner, for that were to enforce a void contract, and repeal an act of Assembly: It will not assist the loser against him, becase he has voluntarily parted with his money: And, as both parties have violated the law, it will not trouble itself to alter the condition in which they have placed themselves. A stake-holder received the deposit to be paid over to the winner, and the authority given him, is countermandable at any time before the payment is made. The money may be stopped *in transitu* to the person entitled to receive it. 3 East. 225. The Court think the Jury were properly instructed, and that the rule for a new trial should be discharged.

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(178)

JOHN VANHOOK and others *v.* JOHN ROGERS' EXECUTOR.

From Person.

Testator lent to his son Littleton three negroes, and directed his executor to hire them out and apply the hire to the support of Littleton during his life, and after his death, to divide the negroes, and their increase, among his son Bird's children, as they should arrive at age. He then directed, that all the remainder of his estate should be sold by his executors, and, after paying debts, &c. be equally divided among his son Bird's children, *as aforesaid.*

Bird had several children born after the death of the testator, in the lifetime of Littleton, and before Bird's eldest child arrived at age. And a question arose, whether these after-born children were entitled to distributive shares of the property included in the residuary clause of the will.

Held, that they were entitled equally with the children born before the testator's death. All the children of Bird are entitled, who were living at the time the property ought to be divided; that time is, *after Littleton's death, and when Bird's eldest child arrives at age.* Both events must happen before a division, and the Court will postpone a division until the happening of the latest event, in order to embrace a greater number of children, in conformity with the principles governing the Court in marriage settlements.

Where a fund is to be divided under a will, persons claiming the fund under a general description, are entitled, if they can bring themselves within the description.

Where property is given to the children of A, and no time is fixed for a division, it is divisible by the will, at the testator's death, although the executors must, by law, hold it for two years for the benefit of creditors; and only children born at the time of the testator's death, or *in ventre sa mere*, are entitled.

John Rogers, by his last will, "lent to his son Littleton Rogers, one bed and furniture, and three of his negroes, Esther, Ned and Let; and directed his executor to hire out said negroes yearly, and apply the hire to the support of his son Littleton, during his natural life; and the overplus, if any, he directed to be yearly applied towards the support of his son Bird's family: and after the death of Littleton, the said negroes, with their increase, *to be equally divided between his son Bird's children, and their heirs, as they should*
(179) *come to lawful "age.*" In another clause of the will, the testator directs, that "all the remainder of his estate should be sold by his executor, and, after paying his debts and a small legacy, *be equally divided among his son Bird's children as aforesaid.*"

This petition was filed by the children of Bird Rogers, who were born at the time of the testator's death, to recover from the executor, the property bequeathed in the residuary clause of the will. The executor pleaded, that there were born to the said Bird Rogers, in lawful wedlock, after the death of the said testator, other children, to wit, Richard, Rebecca, John, James, Sarah, &c. who were not made parties to the petition; and prayed judgment of the Court, whether he was bound to make any further answer. It did not appear in the case, whether Littleton Rogers was dead, or whether the eldest son of Bird Rogers was of full age, before the birth of the after born children. It was referred to this Court to decide, whether the children of Bird Rogers, born after the death of the testator, were entitled to any share of the residue.

HENDERSON, Judge, delivered the opinion of the Court:

Persons claiming under a general description in a will, are entitled, if they can bring themselves within the description, when by the will of the testator, a fund is to be divided. Therefore, where property is given to the children of A, and no time is fixed for a division, it is divisible by the will at the testator's death, although the executor must, by law, hold it for two years, for the benefit of creditors. Of course, only those children born at the time of the testator's death, or *in ventre sa mere*, are entitled. If any after period be fixed by the testator, those who answer the description at that period, will take; and there is a strong leaning in favor of children, to lay hold of any circumstance to postpone the time of division, to embrace all the children, in conformity with the principles governing the Court in marriage (180) settlements, and, in the mean time, to allow maintenance to the children, if necessary. This brings us to the question, When is the residue in this case, to be divided? And this depends on the time the negroes are to be divided, and the effect of the words "*as aforesaid*," in the residuary clause.

The negroes are to be divided after Littleton's death, and when the eldest child of Bird shall arrive at full age; that is, Littleton must be dead, and Bird's eldest child must be of full age. They are not divisible until both happen; the most remote, therefore, determines the time of division. *Then* the residue is to be divided, *as aforesaid*; that is, as the negroes are, at the same time and in the same manner. By this means, the greater number of children will be let in, and the testator's bounty more equally shared. We may suppose the testator intended this fund to be divided when Bird's eldest child should arrive at full age, regardless of the fact of Littleton's death or life; because this fund is not included in the bequest to Littleton for life, and therefore no necessity of postponing it until his death should happen. But this supposition would be to make, not expound the will. It is possible he might have so intended; but he has said otherwise, by directing it to be divided *as aforesaid*, which cannot be satisfied without dividing it in the same manner, that is, among the same persons, which might not be the case if different periods were fixed on for the division. The question in this case is then answered: the children born subsequent to the death of the testator, are entitled. But to make the plea good, it should have been stated or averred in it, that the children were born before the death of Littleton, or before the eldest child of Bird arrived at full age; in other words, before the time of division; for, on that fact depends their claim, and on their claim, the validity of the plea. In its present dress, the plea is bad: and the Defendant must answer. But were the case before this Court, an amendment would be permitted; for it is evident (181) the petition was brought to try the right of the afterborn children regardless of the time when born; whether before or after the two periods before mentioned as the time of division.

JOHN BEARD *v.* JOHN A. CAMERON.

From Bladen.

The 20th section of the Constitution provides, "that in every case, where any officer, the right of whose appointment is, by this Constitution, vested in the General Assembly, shall, *during their recess*, die, or his office, by other means, become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly."

The Honorable Samuel Lowrie, one of the Judges of the Superior Courts of Law and Courts of Equity, died *during the sitting* of the General Assembly in 1818. And after the adjournment of the General Assembly, the Governor, with the advice of the Council of State, granted a temporary commission to the Honorable Blake Baker, to fill the vacancy occasioned by the death of Judge Lowrie.

Under this commission, Judge Baker held the Superior Courts of Law and Courts of Equity, in one of the Judicial Circuits; and a writ being returned before him, at the Superior Court of Law for Bladen County, the Defendant pleaded to the jurisdiction of the Court, setting forth the above facts, and "prayed judgment if he ought to be compelled to answer to the Plaintiff, in his said plea," &c. The Plaintiff demurred, and the demurrer was sustained, and the Defendant ordered to answer over: for,

It is a strange and incongruous position, that an answer can be required to be given by a man, whether he be a Judge, which answer he cannot give unless he be a Judge.

It is true, the extent of the jurisdiction of all Courts, is settled by the Courts themselves: but in all such cases, there is a Court, competent to decide, and it is called upon to decide, not whether it is a Court, but the extent of its jurisdiction.

The plea contradicts a fundamental maxim, that no man shall be a Judge in his own cause. The law wisely presumes that no one in such a situation can give a righteous judgment; and if, as the plea assumes, Mr. Baker was incompetent to hold a Court, still less was he competent to decide whether he could adjudge in this particular case.

The object of the pleadings in this case, was to get the opinion of the Court upon the question, whether, where a Judge of the Superior Courts of Law and Courts of (182) Equity, (whose appointment, by the Constitution, is vested in the General Assembly) dies *during the sitting* of the General Assembly, the Governor has the power, with the advice of the Council of State, to fill up the vacancy occasioned by his death, by granting a temporary commission; the 20th section of the Constitution having declared, that the Governor shall have such power, where the death happens *during the recess* of the General Assembly.

The plaintiff brought an action on the case, and the Defendant filed the following Plea, to-wit:

"And the said John A. Cameron in his own proper person comes and defends the wrong and injury, and says, that this action is *coram non judice:* that there is no Superior Court of Law now in session in the county of Bladen; that a Judge, legally and constitutionally appointed, is a constituent part of a Superior Court of Law for said county, and that the said Blake Baker, Esq. has not been legally and constitutionally appointed a Judge of the Superior Court of Law and Equity of the State of North Carolina aforesaid; and that the said Blake Baker, Esq. is not one of the Judges of the Superior Courts of Law and Equity of the State aforesaid, and that he has no authority to hold the Superior Court of Law of said county, and to preside in the same as Judge; and that he has no jurisdiction over said action, nor any authority to receive any plea or make any order, or give any judgment in, touching, or concerning the same; and this the said John A. Cameron is ready to verify, and, therefore, apprehends that the said Blake Baker, Esq. will not, nor ought to take any cognizance of the action aforesaid here depending against him, &c. Therefore he prays judgment, if he ought to be compelled to answer to the said Plaintiff in his said plea here depending.

J. A. CAMERON."

This Plea was sworn to; and the Plaintiff replied as follows, to-wit:

"And the said John Beard saith, that the said Hon. Blake Baker ought to take cognizance of the action aforesaid here depending against the said J. A. Cameron; and that the said Defendant ought to be compelled to answer over to the said Plaintiff in his said action here depending; because the Hon. Samuel Lowrie, late one of the Judges of the Superior Courts of Law and Equity of the State of North Carolina, died during the recess of the General Assembly of the State aforesaid, and his Excellency John Branch, Governor of the State aforesaid, with the advice of the Council of State aforesaid, issued a temporary commission, bearing date the ...., day of ...... A. D. 1818, (which commission will (183) not expire until the end of the next session of the General Assembly of the State aforesaid, which next session, will not commence until the third Monday of the ensuing month of November,) to the said Hon. Blake Baker, to fill the vacancy occasioned by the death of the said late Hon. Samuel Lowrie, thereby giving to the said Hon. Blake Baker, during the term aforesaid, all the powers and authorities of a Judge of the Superior Courts of Law and Equity of the State aforesaid, which gives him full power and authority to hold the Superior Court for the county of Bladen at this time, and gives him jurisdiction over the aforesaid action; and this the said John Beard prays may be enquired of by the county.

JAMES J. MACKAY,
For the Plaintiff."

To this Replication the Defendant rejoined:

"And the said John A. Cameron, as to the replication of the said John Beard to the said plea of him, the said J. A. Cameron, saith, that the General Assembly of the State of North Carolina commenced its annual session for the year 1817 on the third Monday of November in said year, at the city of Raleigh, in the State aforesaid, being the time and place prescribed by law for said session; and that the said General Assembly continued in session until the 24th day of December in the said year, when the said General Assembly adjourned *sine die* about 10 o'clock A. M. of said day; and the late Hon. Samuel Lowrie, one of the Judges of the Superior Courts of Law and Equity of the State aforesaid, died on the 22d day of December, 1817, about the hour of 8 o'clock A. M. at his residence in the county of Mecklenburg, about 150 miles from the city of Raleigh aforesaid, and that the Hon. Samuel Lowrie died, and the office of Judge which he held as aforesaid became vacant during the aforesaid session of the General Assembly, and that sufficient time elapsed between the death of the said Samuel Lowrie and the adjournment *sine die* as aforesaid of the said session of the said General Assembly of the State of North Carolina as aforesaid, for the said General Assembly to have known and been informed of the said death of the Hon. Samuel Lowrie, and consequent vacancy of the said office of Judge, and to have appointed a successor of the said Hon. Samuel Lowrie to fill said vacant office before the time of their adjournment *sine die* as aforesaid; and that the said Hon. Samuel Lowrie did not die, nor the said office of Judge which he held as aforesaid become vacant, during the recess of the said General Assembly; but the said General Assembly was in session at the time of said death, and that his Excellency John Branch, Governor of the State aforesaid, with the advice of the Council of State, had no authority to issue to Blake Baker, Esq. a temporary commission to fill the said vacancy occasioned by the (184) said death of the said Hon. Samuel Lowrie, until the end of the next session of the said General Assembly; and if such commission had been issued by the Governor, with the advice of the Council of State, it is an usurpation of power, not delegated to them, or either of them, by the people of North Carolina, is in violation of the express words and in contravention of the spirit of the Constitution of the State aforesaid, and at warfare with the genius of her republican institutions; and that the said Blake Baker, Esq. has not the authority of a Judge of the Superior Courts of Law and Equity of the State aforesaid; and that he has no authority to hold the Superior Court of Law for the county of Bladen aforesaid, or to preside in the same as Judge; and that he has no jurisdiction over the said action, nor any authority to receive any plea or make any order, or give any judgment in, to, or concerning the same; and of this he the said John A. Cameron puts himself upon the country, &c.

J. A. CAMERON."

To this Rejoinder the Plaintiff demurred, and the Defendant having joined in demurrer, the case was sent to this Court.

HENDERSON, Judge.—It is, to my mind, a very strange and incongruous proposition, that an answer is required to be given by A. B. whether he be a Judge, which answer he cannot give unless he be a Judge. I plead that you are not a Judge: a Judge alone can decide the plea; and I call on you to decide. This certainly cannot be the way of testing Judge Baker's appointment. The way is very simple, but it is not for this Court to point it out. It is said that the extent of the jurisdiction of all Courts is settled by the Courts themselves. This is true: but then it must be remembered that in all such cases there is a Court competent to decide; and it is called upon not to decide whether it is a Court, but the extent of its jurisdiction. The plea must therefore be overruled.

TAYLOR, Chief-Justice.—This is a plea filed by the Defendant in person, objecting to the right in the late Judge Baker to hold the Superior Court of Bladen as the Judge thereof, on the ground that the Judge whose place he was appointed to supply died during the session of the General Assembly; that the Governor and Council can supply only such vacancies, in the judicial department, as
(185) occur during the recess of the General Assembly;
and that, consequently, the appointing and commissioning of Judge Baker were unauthorized by the Constitution. The pleadings are drawn out to considerable length, but it is deemed unnecessary to recite them, or to examine their sufficiency in point of form; because the objection intended to be made is presented in an improper shape: the effect of assuming a principle wrong in itself, and building on a foundation radically defective.

The Defendant prays judgment if he ought to be compelled to answer to the Plaintiff in his said plea here depending. Whom does he ask to pronounce this judgment? The person who is asserted by the plea to be constitutionally incompetent to render any judgment. If the person holding the Court were not a Judge duly authorized and rightfully commissioned, he could render a judgment in no case: none of his acts or proceedings could possess a judicial character, or be capable of effecting, in any shape, the rights or property of the citizens. It must be nugatory then, to propound to the person assuming this authority, a question involving his competency to decide; for that were to ascribe to his decision an authority which the very statement of the question denies it to possess. If he were to decide that he is a Judge, and proceed to try the cause and give final judgment, no efficacy could be imparted to such judgment by his decision: it would be *ipso facto* a nullity, in one case as well as in the other, and no act of his could give it the force of *res adjudicata.* The highest evidence of the opinion of a person acting in the character of a Judge, that he has a right to do so, is exercising the functions of the office. This has already been given; and the strength of such evidence is not increased by his particular opinion to the same effect expressed, or a plea to the jurisdiction.

The plea, however, contradicts a fundamental maxim of all laws, that no man shall be a judge in his own cause. This is, in an especial manner, the cause of the per- (186) son called upon to decide it; for, if the power he exercises be an usurpation, he is indictable for a misdemeanor, and subject to fine and imprisonment. It is not necessary to say to what extent he would be liable to individuals injured by his acts, or to the public for executing the laws involving capital punishment. It is enough for the principle of this case to show, that Mr. Baker could not answer the question submitted to him by the plea, without deciding on his own amenability to a prosecution. The law wisely presumes that no one in such a situation can give a righteous judgment; and if, as the plea assumes, he was incompetent to hold a Court, still less was he competent to decide whether he could adjudge in the particular case. The plea must be overruled, and the Defendant answer over.

JETER AND JETER *v.* LITTLEJOHN'S EXECUTORS.

From Granville.

A bond was given before the revolutionary war for a certain sum, proclamation money. During the war a tender of the debt was made in paper money, but before the paper money depreciated. In 1798, application was made for payment, suit was instituted and judgment recovered. The Defendants at law filed their bill in Equity, to be relieved from the payment of interest, from the time of the tender to the time application was made for payment in 1798, and charging in their bill that they knew not where the bond was, until this application for payment was made.

Complainants are entitled to be relieved against the interest, from the time of the tender to the demand for payment: for at the time the tender was made, paper money was a legal tender, and it had not depreciated.

A plea of tender can be supported at law, only by the Defendant's bringing into Court the money he admits to be due: and this is required that the Plaintiff may have the immediate benefit of the sum so paid in.

Complainants prayed in their bill to be relieved against the payment of interest upon a bond given before the revolutionary war, and on which a tender had been made (187) in paper money before its depreciation. The bill charged, that Samuel Jeter, the father of Complainants, some time before the revolutionary war, executed to Young, Miller, & Co. his writing obligatory, for the sum of 259*l.* proclamation money, with a condition underwritten, that said writing should be void on his the said Samuel's paying on or before a particular day therein mentioned 129*l.* 6*s.* like money. That the said Samuel in 1777 or 1778, after the bond became due, tendered the sum due on said bond to Robert Bell, the known agent of the firm of Young, Miller, & Co. and who then had the bond in his possession: that the tender was made in paper money, then the currency of the State, and not depreciated; that Bell refused to receive the money so tendered: and most of the partners of the firm being British merchants, shortly afterwards withdrew from the State, in consequence of the hostilities then existing, and remained abroad until the close of the war: that the said bond was taken away by them, or left here in a place unknown to the said Samuel. That Samuel Jeter died about the year 1796: that no application was made to him for payment, after the tender made by him in 1777 or 1778. That in 1798, application was made to Complainants for payment, and they were sued as executors *de son tort*, of the said Samuel, and judgment obtained in Hillsborough Superior Court at October Term, 1801. The bill prayed, that the Plaintiffs at law might be enjoined from enforcing payment of interest upon the sum mentioned in the condition of the bond, from the time of the tender to the time application was made to Complainants for payment, in 1798.

An injunction was awarded agreebly to the prayer of the bill; and George Alston and William Littlejohn, the surviving partners of Young, Miller & Co. put in their answers, and admitted that Robert Bell was the agent of the firm, denied any knowledge of the tender charged in the bill, and contended, that if any such tender were made, it was at a time when the paper money had greatly depreciated, (188) and that Complainants ought to have availed themselves of the plea of tender in the trial at law.

Upon the hearing of the cause, an issue was submitted to the Jury, Whether Samuel Jeter did tender to Robert Bell, agent of the firm of Young, Miller, & Co. the sum actually due on the said bond, or offered to pay the same; and if so, at what time? The Jury found that Samuel Jeter did make such a tender, and made it before any depreciation of the paper currency took place. It was referred to this Court to say what decree should be made in the case.

BY THE COURT.—A plea of tender can be supported at law only by the Defendant's bringing into Court the money he admits to be due; and this is required, that the Plaintiff may have the immediate benefit of the sum so paid in. But the reason of the rule altogether fails, when money has so notoriously depreciated as to have become of no value. Is it probable that the Plaintiff would, in such a case, take the money out of Court? Or is it reasonable that a debtor should be required to preserve it through a long period of such civil convulsion as that which occurred after the tender was made? This, the finding of the Jury has fixed at a period anterior to any depreciation, and therefore, the loss ought not to fall on the complainants. The Court is clearly of opinion, that the Complainants are entitled to a deduction of the interest from the time the tender was made until a demand for payment was made, of which an account was to be taken by the Master.

(189) KINCHEN NORFLEET *v.* DANIEL SOUTHALL.

From Gates.

Bill for the specific execution of a contract. A and B, having at their joint expense, built a set of mills, A agreed to convey to B, his moiety of the mills, upon B's paying to him, the sum which the mills cost him; and it was further agreed, that four persons, then named by the parties, should determine this sum. A then declared, that he would no longer be responsible for any damage the mills might sustain, he being no longer the owner of any part of them; and B proceeded and expended considerable sums in improving the mills. The arbitrators met, and were unable to agree in opinion, as to the sum which the mills cost A, who refused to have an umpire chosen. The bill prayed that A might be decreed to render an account of what the mills cost him, that he might receive that sum, and execute a conveyance to B. The bill dismissed; because,

It seeks to enforce an agreement which the parties did not enter into; their agreement being, that B should pay to A, the sum which *the arbitrators should determine*, and not the sum which A should state in account, or that the Master should find upon taking an account.

Where a reference is made to several persons, the concurrence of all is necessary, unless it be expressly agreed in the submission, that a less number may make the award: and, as either party may revoke the authority given to the arbitrators in common cases before an award, so either party may refuse to have an umpire chosen, where the arbitrators disagree.

Here the arbitrators were to settle the price of the purchase; this price is an essential part of the contract; the Court cannot substitute itself for the arbitrators, where a substantial thing is to be done by them. The Court will not even divide an estate, where the parties have selected particular persons to do it; for it is a personal confidence which cannot be reposed in others against the will of its authors.

The bill in this case was filed to enforce the specific execution of an agreement, alleged to have been entered into between the Complainant and Defendant. The parties having built a saw and grist mill on Bennett's creek, at their joint expense, it was agreed that Southall should convey his title thereto to Norfleet, upon Norfleet's paying to him the sum which the mill had cost him: and it was further agreed that four persons then named should determine what sum Southall had thus expended. When the agreement (190) was made, Southall declared in the presence of witnesses, that no part of the mill belonged to him, and that he would no longer be responsible for any damage it might sustain: upon which Norfleet proceeded to complete the mill at his own expense, in doing which he disbursed a considerable sum. The arbitrators chosen by the parties, met upon the business, but were unable to agree in the estimate of the sum expended by Southall, who rejected every proposition to refer the matter to an umpire to be chosen by the arbitrators, or to another set of arbitrators; or to make a title upon being paid the cost of the mill. The bill prayed that Southall might be decreed to render an account of what the mill cost him, and to convey his title to the moiety of the mill, upon receiving the amount so expended.

To this bill the Defendant demurred, and the question arising upon the demurrer was sent to this Court.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

It is a general rule that an agreement, to be specifically enforced, should be certain and defined, and be proved or admitted to have been concluded by the parties. But the objection to this bill meets us *in limine*, that the agreement sought to be enforced, was never entered into by the parties. The bill prays that the Defendant may be compelled to convey on being paid the money he has expended in building the mill; whereas, his contract was that he would convey, upon four persons, then named by the parties, ascertaining what it cost him. The parties would not take upon themselves to ascertain the price of Southall's moiety, but selected certain individuals to determine it, in whose probity and skill, in the subject referred to them, they had full confidence; and there is no reason to infer that they were willing to transfer this confidence to any others; for the arbitrators were nominated without allowing them to choose an umpire, in the event of a disagreement, or making any for such a case. So that the legal consequence was, that the question referred to the arbitrators could not be determined, unless they were unanimous in their judgment; it being very clear, that where a reference is made to several persons, the concurrence of all is necessary, unless it be expressly provided for in the submission that a less number may make the award. In substance and effect, then Southall's agreement was "not that I will sell you my share of the mill upon your paying me what it cost; but I will sell it to you, provided four certain persons, to be named by us, unite in their judgment and opinion as to what it cost. If they do not concur in opinion, there is no contract between us." The parties have made an effort towards contracting, which has terminated in an inchoate agreement: and if this Court were to direct a reference to the Master, or any other person, to ascertain the price, and decree upon such a report, it would be making a contract for the parties, and then enforcing it.

Suppose, before the arbitrators had met, either party became dissatisfied with the agreement they had made, for any reason, good or bad, it would have been perfectly competent for either to revoke the authority of the arbitrators; and if they had proceeded to make an award afterwards, the party revoking would not have been bound by it. Can it be less reasonable, that if the arbitrators make an unsuccessful attempt to estimate the price, either party may refuse to nominate an umpire, or to appoint other arbitrators? There may be as much reason, or more, to avail themselves of the *locus penitentæ* at the latter period, as at the former one. It is a right equally retained by both parties, since they have not surrendered it by the submission on the contract, and neither can compel the other to proceed beyond the stipulation.

But it is said, that the sale of Southall's moiety was complete; and that all the arbitrators had to do, was to (192) ascertain the price, which was a mere matter of account, within the power of any person who could calculate, and equally within the power of the Master in Equity. That it was not easily done, is demonstrated by the arbitrators not having been able to accomplish it; and it cannot be doubted that they were selected with a circumspect view and calculation of their peculiar fitness for the task, and of their competency to derive, from local observation and experience, all the facts necessary to enlighten their judgment. If such persons were oppressed by the inquiry, it is utterly improbable that any one appointed by the Court would find it less embarrassing, or be able to conduct it in a manner more likely to lead to a satisfactory result. A price ascertained by persons chosen as these arbitrators were, would, it is probable, be a very different thing from a price ascertained by a Master in Equity: and to compel Southall to convey upon receiving the latter, would be exercising an arbitrary discretion, which this Court wholly rejects. It may not be difficult, in general, to set a price on anything which is the subject of sale, to estimate the value of a rent, to decide on the quality of a piece of merchandise, to settle the shares of gain and loss between partners; yet, when the parties have chosen arbitrators to do it, the whole current of authorities repels the interposition of this Court. Stronger reasons exist to prevent their interference in the particular case, to ascertain the costs of the mills; a task, which, according to the usual manner of conducting such business in this country, by persons doing the chief labor within themselves, as it is called, and with their own slaves, calls for a knowledge of a peculiar kind, and a familiarity with customs and practices, which change with the geographical limits of the State. The price of property is an essential article in the sale, and the books furnish no case or principle authorizing the Court to substitute itself for the arbitrators, where a substantial thing is to be settled by them. 6 Vesey, 34. They (193) will not do so, even to divide an estate, where the parties have selected particular persons to do it; because it is a personal confidence, which, in the nature of things, cannot be reposed in others against the will of its authors. In short, the authorities of law are uniform on the subject, from the first trace that can be found in the books, down to the case of Milner *v.* Grey (14 Ves. 406); and the Court is of opinion, that there are stronger reasons for refusing relief in this case than appeared in that. It is satisfactory to perceive, that before the ample discussion which the subject has recently undergone in England, a great Judge in a sister State, had applied the powers of his vigorous intellect to its elucidation, and discussed it in a manner the most perspicuous and convincing. 1 Wash. 295 The demurrer must be sustained, and the bill dismissed with costs.

(194)

JOHN L. MILLER, by his Guardian WILLIAM MILLER, *v.* ROBERT H. HARWELL, surviving Executor of THOMAS MILLER, and against MARMADUKE JOHNSON.

From Warren.

Contribution between devisees and legatees.—Testator devised his lands to Fleming, an alien, and three negro slaves to his brother Thomas. He appointed Fleming and Harwell his executors, and gave them power to sell such of his property as they might think necessary for the payment of his debts.

The executors sold the lands, and applied the purchase money to the payment of Fleming's debts. The negro slaves bequeathed to testator's brother Thomas were then sold to pay the testator's debts. They were sold upon a credit, and purchased by the guardian of Thomas, in trust for him. The guardian gave his own bond for the purchase money.

Thomas, the legatee, filed his bill against Harwell, the surviving executor, (Fleming having died) charged him with a misapplication of the purchase-money of the lands; that the lands were sold avowedly to pay the debts of the testator, and if the money had been applied to this object, it would not have been necessary to sell the negroes. The bill prayed, as against Harwell, that he be decreed to deliver up the bond which he had taken for the purchase-money of the negroes.

The bill was also filed against Johnson, the purchaser of the lands, charging him with notice of the trusts of the will, and with connivance in the misapplication of the purchase-money; and prayed, as against him, that if Complainant could not be otherwise relieved, he, Johnson, might be decreed to pay to Complainant the value of the negroes.

To this bill the Defendants demurred, and showed for cause, that it appeared by Complainant's own showing, that he was not interested in the question made in the bill relative to the sale of the lands, or the proceeds of the sale, nor entitled to have the bond delivered up. The demurrer allowed, for

The personal estate is primarily liable to pay debts; and although the testator might have subjected *any particular part of his estate* to this purpose, yet, in this case, he has not done so; he has given power to his executors to sell any part of the estate they pleased, to pays debts. This does not transfer to the real estate the liability of the personal to pay them; and, after the death of the debtor, the law directs the personal estate to be exhausted, before the lands shall be resorted to for satisfying debts.

The rule, therefore, does not apply in this case, "that where one (195) claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien." In the life-time of the testator, creditors might sue out their executions against his real, as well as his personal estate; but after his death, the lands go to the heir or devisee, and the personal estate to the executor, and creditors cannot pursue the first until the latter be exhausted in satisfying their simple contract debts; and the bill does not charge that Complainant's legacy was sold to pay specialty debts. The Court must, therefore, presume that it was sold to pay simple contract debts only. Heirs and devisees cannot be sued in the first instance for such debts, and the lands descended or devised to them cannot be subjected to their payment, except in the way pointed out in the act of 1784, ch. 11.

If, then, the lands devised in this case had been sold, and simple contract debts paid with the proceeds, the devisee would have a right to call upon the legatee of the personal estate to make his devise good to him.

But if the debts were specialty debts, Complainant could not stand in the place of the specialty creditors, as against the devisee of the lands, because such a devisee is as much *a specific* devisee, as the specific devisee of a chattel.

The principal rule in marshalling assets is, that when a creditor may resort to both the real and personal estate, and the legatee can only resort to the personal, if this be insufficient to pay both, the creditor will be confined to the real estate: or, if he has been satisfied out of the personal fund, the Court will permit the legatee to stand in his place, and receive satisfaction out of the real estate, to the amount taken from the personal.

But this rule operates only where the real estate is charged with the payment of the debts or legacies, or where the creditor has a lien upon it except where the donee is heir at law, and then against him, the lands will be liable to the specialty debts in case of the personal estate.

Fleming must be considered a devisee of the land; for an alien can *take; for whose benefit* he takes, is a question in which Complainant has no interest.

The Complainant filed his bill in the Court of Equity for Warren County, against Robert H. Harwell, surviving executor of the last will of Thomas Miller, deceased, and against Marmaduke Johnson, and therein charged, that Thomas Miller, late of Warren County, departed this life in April, A. D. 1806, having made and published the writing, his last will, of which he appointed Robert Fleming and Robert H. Harwell executors; who, after his death, proved the will in Warren County Court, and took out letters testamen- (196) tary. That the testator devised as follows, to-wit:

"I give and bequeath unto Robert Fleming, all my land which I now own; and also the property which I have in the Store now occupied by Fleming and myself, to him and his heirs for ever."

"I give and bequeath unto my brother, John L. Miller, three negroes, Pompey, Cheyney and Clarissa, and their future increase, to him and his heirs for ever."

"I will that all my just debts and funeral expences be paid by my executors, *out of my property, or the money arising by the sale of such as my executors may deem necessary to be sold.*"

That the tract of land devised to Robert Fleming, contained five hundred acres, and the stock in trade bequeathed to him, amounted to fifteen hundred dollars: that Robert Fleming was an alien, incapable of holding lands.

That some short time after the death of the testator, James G. Brehon recovered a judgment against Robert Fleming and Marmaduke Johnson, in Warren County Court, for one thousand pounds, or thereabouts, sued out his execution thereon, and the money was about to be raised out of the property of Johnson; to avoid which, and to indemnify Johnson against the payment of this money, it was agreed between Robert Fleming, Robert H. Harwell and Johnson, that the land devised to Fleming should be sold to Johnson for one thousand pounds or thereabouts; that in pursuance of this agreement, Johnson discharged Brehon's judgment, and Fleming and Harwell, as executors of the last will of Thomas Miller, executed to him a deed for the land. That the parties pretended publicly, that this sale was made for the purpose of paying the debts of Thomas Miller: but in fact, it was made for no other purpose than to discharge Brehon's judgment, and to keep Johnson indemnified.

That in consequence of this sale, and the application of the purchase money to the payment of the debts of Fleming, the debts of the testator were left unpaid. That Fleming (197) soon afterwards died, intestate and insolvent. That since his death, the creditors of Thomas Miller had sued Robert H. Harwell, the surviving executor, and recovered judgments to the amount of five hundred pounds and more; to satisfy which, the three negro slaves bequeathed to the Complainant, had been sold by Harwell, the executor, and purchased by William Miller, guardian to the Complainant, at the price of $1123: That the said purchase was for the benefit of the Complainant, and that Willam Miller gave his own bond for the purchase money, payable on the —— day of ——. The bill prayed that Harwell, the executor, might be decreed to deliver up to Complainant, William Miller's bond: that he and Johnson might be decreed to pay to the creditors of Thomas Miller, their respective demands, at least to the amount equal to the value of the land sold to Johnson, in order that such payment might be applied in exoneration of the specific legacy bequeathed to the Complainant: and that Complainant might have such other relief as in Equity he was entitled to.

To this bill, Harwell and Johnson demurred, and, for cause of demurrer, shewed, that it appeared by the Complainant's own shewing, that he was not interested in the question made in the bill, relative to the land, or the sale or proceeds thereof; and that it appeared by his own shewing, that he was not entitled to have the bond of William Miller delivered up to him. They also answered and denied the fraudulent combination charged in the bill, relative to the sale of the land.

The case was sent to this Court, and the Judges were divided in opinion upon the questions arising on the demurrer. The Chief-Justice and Judge Hall being of opinion, that the demurrer should be sustained, and the bill dismissed; and Judge Daniel, (who sat for Judge Henderson) being of opinion, that the demurrer should be overruled, and relief be decreed to the Complainant.

DANIEL, Judge.—The bill is filed by a specific legatee, (198) who claims to be placed in the shoes of the creditors of the testator, and to have reimbursed out of the sales of the real estate, the value of his specific legacy, which has been taken to satisfy their demands. It appears from the case, that the testator gave to his executors, a general power to sell so much of his property as would pay his debts; and this must be taken as a charge upon all his estates, both real and personal. He then gave the Complainant a specific legacy of some negroes, and devised his land to Robert Fleming, an alien. He appointed Robert Fleming and Robert Harwell, his executors, who, by virtue of the power given to them by the will, and in their character of executors or trustees, sold the land to Johnson, who had full notice of the trusts of the will. Johnson has not paid the purchase-money to the trustees, nor to the creditors of the testator. He has applied the money to the payment of a debt which the trustee, Fleming, owed, and for which payment he was bound, as Fleming's security. He contends, that this payment, being made by the consent, or at the request of the trustee, discharges him from all further liability.

I will examine, 1st, Whether the complainant can be placed by this Court, in the situation of the creditors of the testator; and, 2dly, Whether he can sustain his bill against Johnson, under the particular circumstances of this case.

1st. It appears that the creditors of the testator had a lien on both the real and personal assets, for the payment of their debts. The Complainant, who was only a specific legatee, had no other lien, but on the specific property bequeathed to him. It is said by Lord Hardwicke, that "It being the object of a Court of Equity, that every claimant upon the assets of a deceased person, shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied in satisfaction thereof, it has been long settled, that where one claimant has (199) more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien." 2 Atk. 446. I Ves. 312. If, therefore, a specialty creditor, whose debt is a lien on the real assets, receives satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets (1 Vern. 455. 1 Eq. Ca. Ab. 144. 2 Vern. 763. 2 Atk. 436); and legatees shall have the same equity. Ch. Ca. 117. 1 P. Wms. 730. So where lands are subject to the payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets. 3 P. Wms. 323. These authorities shew, that the Complainant has a right to stand in this Court in the place of creditors who have exhausted the fund set apart to satisfy him, and be reimbursed out of that fund which the creditors might have resorted to, but which they have left untouched.

2d. Has the Complainant, under the circumstances set forth in the bill, and admitted by the demurrer, a right to call on the Defendant, Johnson, for satisfaction? I admit that where the trust is *general*, as, to pay debts, the purchaser, although he has notice of them, is not obliged to see the money applied. 1 Bro. Ch. 186. 2 Fonb. 148. But I hold the money should be paid, and without any collusion of the trustee to defeat the object of the trust. It is held, that purchasing from an executor shall never protect any person who has full knowledge that the money will be misapplied. 2 Br. Ch. 434. 4 Br. Ch. 125, 130. 2 Vern. 616. 7 Ves. 152. Johnson has never paid the purchase-money; or if he has, it was with a full knowledge of the trust, and in direct violation of it. The payment of Fleming's debt, to which he was security, cannot screen him from paying the purchase-money properly. I think the Complainant (200) has a right to resort to this money for satisfaction, and that the demurrer should be overruled.

HALL, Judge.—This case comes on upon a general demurrer. The bill does not state that any of the debts which the specific legacy of the Complainant was sold to pay, were specialty debts, that bound the heir or devisee. It is therefore proper to examine the question, as if that legacy had been sold to satisfy simple contract debts only. What difference there might be in the case, provided those debts had been due by specialty, and bound the heir and devisee, it is not necessary now to examine. Admitting the fact, that the debts discharged by the sale of Complainant's legacy, were simple contract debts, it cannot be successfully contended, that Fleming, the devisee, was bound to contribute, because, in this State, lands are bound for the payment of debts of all kinds. It is true, that the statute of 5th Geo. 2 ch. 7, as well as our own statute law, imposes upon lands that liability, and an execution taken out would subject them, as well as the personal estate, in the hands of any person who is the owner of both. But after the death of that person, the lands cannot be legally subjected to an execution issuing upon a judgment obtained against his executor or administrator. The executor or administrator has nothing to do with the land. It descends to the heir, or goes to the devisee; and neither of them can be divested of it without notice, without being made a party to some proceeding instituted against him for that purpose. How this was done before the year 1784, or whether any regular mode was pursued, does not appear. It appears probable, that there was no regular mode; for the act of 1784, ch. 11, in its preamble declares, that "Whereas doubts are entertained, whether the real estate of deceased debtors, in the hands of heirs and devisees, shall be subject to the payment of debts upon judgments obtained against executors or administrators, in order to remove such doubts in future, and to direct the mode (201) of proceeding in such cases, be it enacted, &c." The act then directs a *scire facias* to issue, to give the heir or devisee notice, &c. and in the 5th section, power is given to the heir or devisee, to plead that the executors or administrators have assets in their hands to pay the judgment, or have wasted or concealed them: and to have an issue made up to try that fact. If upon the trial of such issue it shall be found that they have assets, no judgment can be pronounced against the heir or devisee, upon the *scire facias*. So that it is clear, lands cannot be made liable to the payment of simple contract debts, except where there is no personal estate in the hands of the executors or administrators.

It would appear strange, then, to say that Fleming, as devisee, should contribute to the payment of simple contract debts, when the land devised to him was not answerable as long as there was personal estate.* Heirs and devisees cannot be sued, in the first instance, for simple contract debts. Lands cannot be subjected to the payment of such debts, except in the way pointed out by the act of 1784. The act of 5 Geo. 2d, as well as an act of 1777, makes lands liable: the act of 1784, points out the mode of proceeding against them after the death of the debtor.

But it is said, the executors in this case were authorized by the will, to sell any part of the estate they pleased, for the payment of debts: and, as they thought proper to sell the land devised to Fleming, the proceeds of that sale are liable to the payment of debts, and therefore the Complainant is entitled to recover the full amount of his legacy, out of the proceeds of such sale. On this part of the case, it is to be observed, that the testator himself might have subjected any part of his estate he pleased to the payment of debts: if he has not done so, the law will do it for him. I think he has not done so: for, by giving the executors the power to sell the real estate, he has not transferred the liability of the personal estate to the payment of debts, to the real estate: in other words, the executors have not, by the will, power to ruin one legatee by selling his legacy, and place (202) another in the full enjoyment of his legacy, because they do not think proper to sell it. The right of compelling contribution remains as it would, if one legacy was sold by execution and another not, which was equally bound for the debt. Let us then suppose, that the land in question had been devised to A B, and not to Fleming, and the executors had thought proper to sell it. Certainly A B would have a right to call upon the legatees of the personal estate to make his devise good to him, because it had been sold to satisfy debts for which it was not liable, but for which their legacies only, were liable. If this be correct, the money for which the land was sold being in the hands of Fleming, is where the law would place it: for, if that money had gone in discharge of debts, the Complainant's legacy would be bound to make it good. The reason why power is frequently given to executors to sell property at discretion to pay debts, is, that they may not be tied down to the slow mode of proceeding pointed out by law, by applying to Courts for permission to sell property, when they shall be notified of debts existing against the estate.

Another circumstance has been relied upon, and that is, that Fleming is an alien, and cannot hold lands. Whether he can hold lands or not until office found, I shall not enquire: I shall only refer, in support of the affirmative of the proposition, to Co. Lit. 2 B. 52 B., 129. Dyer 2 B Powell on Devises, 316. 10 Mod. 128. 7 Cranch, 619. 1 Mass. Rep. 256. Suppose, for the sake of argument, that the heirs at law are entitled: this suit is not brought by the Complainant in that character. It does not appear who the heirs at law are. The bill is brought by the Complainant to compel Fleming to make good his legacy, which was sold for the payment of debts, or to contribute thereto. Whether the land be devised to an alien; if it be, whether the heirs at law be entitled, or whether it escheats, matters not. It is not liable to the payment of debts until the personal (203) estate be exhausted. Whatever view, therefore, I have been enabled to take of the subject, I am convinced the demurrer should be sustained and the bill dismissed.

TAYLOR, Chief-Justice.—The facts forming this case are shortly these. Thomas Miller died in 1806, having first made his will, by which he appointed Robert Fleming and Robert H. Harwell his executors; both of whom qualified, and whom he directed to sell such part of his estate for the payment of his debts as they might think proper. He also devised to R. Fleming, one of his executors, a tract of land in Warren County, and bequeathed to him his stock in trade, to the amount of fifteen hundred dollars; and to the Complainant, his brother, he bequeathed three negroes. After the death of the testator, Brehon recovered a judgment against Fleming, and M. Johnson, as his security, for about one thousand pounds, and an execution issued, which would have been levied upon Johnson's property; to avoid which, he and the two executors made an agreement, whereby he became the purchaser of the land for the price of one thousand pounds. This sale was ostensibly made for the purpose of paying the debts due from the estate, but was, in reality, the result of a combination between the executors and Johnson, to discharge Brehon's judgment. The consequence of the sale was, to leave the debts unpaid, and to expose the Complainant's legacy, as the only fund out of which the creditors could obtain satisfaction. This has accordingly been sold, to satisfy the judgments against the executors, which the Complainant alleges, ought to have been paid by the sale of the land. William Miller, guardian of the Complainant, became the purchaser of the negroes in trust for the Complainant, and gave his bond for the payment of the purchase-money. Fleming, who was an alien, died soon after the sale, insolvent. The prayer of the bill is, that the bond of William Miller may be delivered up, and the Defendants decreed to pay such sum of (204) money as the Complainant is entitled to.

The Equity relied upon in the bill, consists in this, that the Complainant has lost his legacy, because the price of the land was not applied to the payment of the debts. To support this ground of equity, it ought to be shewn that the land was liable to the payment of the debts, and that a specific legatee is entitled to call upon the devisee of the land, in exoneration of his bequest. If either no power had been given to the executors, to sell such property as they

thought fit, for the payment of debts, or they had omitted to exercise the power, the Complainant's legacy would have been first liable, and on that proving deficient, the creditors would have resorted to the land. Had the debts been satisfied out of the Complainant's legacy, he could not stand in the place of the bond creditor, because the devisee of land is as much a specific devisee, as the specific devisee of a chattel. 3 P. Wms. 324. With less reason can such a claim be made where simple contract debts have exhausted the legacy. The principal rule in marshaling assets is, that when a creditor may resort to both the real and personal estate, and a legatee can only resort to the personal, if that be insufficient to pay both, the creditor will be confined to the real estate: or if he has been satisfied out of the personal fund, the Court will permit the legatee to stand in his place and receive satisfaction out of the real estate, to the amount of what has been taken from the personal. 1. P. Wms. 679. But this rule can only operate where the real estate is charged with the payment of debts or legacies, or where the creditor has a lien upon it, except where the donee is heir at law, and then against him, the lands will be liable to the specialty debts, in case of the personal estate. 3 Atk. 272. Amb. 127. In this case, there is nothing stated in the bill whence it can be inferred that the debts were due by specialty, and it must be taken for granted, that they were not so. They have therefore been paid out of the proper and primary fund, and this would be a sufficient reason for refusing relief.
(205) But if the debts had been due by specialty, contribution could not have been claimed against the specific devisee of land. I have considered Fleming as the devisee of the land, notwithstanding the statement in the bill, that he was an alien; and I believe the law to be well settled, that an alien may take by devise, although there be some cases and dicta to the contrary. The question occurred before Lord Hardwicke, in Knight *v.* Du Plessis (2 Ves. 360, 7 Cranch 618), who said he did not remember any doubt or distinction, made between a grant, conveyance, or devise to an alien; for an alien might take; the only consideration, therefore, would be, for whose benefit. And this opinion is adopted by the modern writers on devises. Powell 316. 3 Cruise, Title Devise.

As the Complainant, then, would be entitled to no relief in this view of the case, it is to be enquired whether his claims are strengthened by the power given to his executors to sell, and the execution of the power by the sale of the land. The testator has not placed the burthen of the debts upon any particular part of the estate; it is, therefore, left to the operation of law, and it was entirely in the discretion of his executors as to what part should be sold. Had they disposed of the Complainant's legacy for that purpose, he could have no claims against Fleming, as the cases cited prove: and it is difficult to imagine that Harwell and Johnson should be responsible to him, the one for selling, and the other for purchasing land, which was chargeable with no claim, either of his or the creditors. Upon the supposition of the combination charged in the bill, between Johnson and the executors, no one can call them to account for the misapplication of the purchase-money, who would not have an interest in the land if it had remained in Fleming's possession till his death. Whether this would be the heir at law of the testator, of Fleming, or the Trustees of the University, claiming by escheat, it is not necessary to determine. The Complainant is announced only in the character of a specific leg- (206) atee, claiming satisfaction for his legacy. It is certainly not to be approved of, that the land should be sold avowedly to pay the debts of the estate, and afterwards, that the money should be applied to different objects; but if the transaction had been called by its true name, a sale for the benefit of Fleming, upon what ground could it have been assailed? The devise was to him: he was an inhabitant of the State, and a few years longer life and residence, would have entitled him to the rights of citizenship. It is altogether improbable, that the State, or any person claiming under her, would have disturbed him in the enjoyment of the land, had he chosen to keep it.

The case of Long *v.* Short (1 P. Wms. 403), has been cited by the complainant's counsel, to show, that the specific devisee of land should contribute with another specific legatee to the payment of debts. But in that case, both devises were derived from the same subject, which was separated into a fee and lease for years; and a devise of a term for years being as much a specific devise, as a devise of lands in fee, to defeat either would equally disappoint the intent of the testator: and the devisees were decreed each to contribute in proportion to the value of the respective premises. But the deficiency was made to fall upon the lands of inheritance, only so far as it arose from the payment of specialty debts; as to the simple contract debts, they were chargeable solely on the leasehold. The case does not prove any thing towards establishing the point that the lands were bound to contribute in this case to the Plaintiff's legacy. Upon the whole, it appears to me, that the Defendants have equal equity with the Complainant. The land has been applied to the benefit of him to whom it was devised; and when the testator directed a sale for the payment of his debts, it is not to be presumed that he meant a sale of the lands, neither in point of law, nor according to the usage of the country, which is rather to pay debts with personal (207) property; and the Defendants having the law in their favor, the bill must be dismissed.

SAMUEL STRUDWICK *et al.* *v.* PASQUALE PAOLI ASHE AND WIFE.

From New Hanover.

A man dies seised of lands situated in two counties. The lands in one county are partitioned among the heirs at law, by commissioners appointed by the County Court, agreeably to the provisions of the act of 1787, ch. 17. This partition does not preclude the Court of Equity from decreeing a sale of the lands situate in the other county, if it appear to the Court that partition cannot be made of the lands without injury to the parties interested.

This was a petition filed in the Court of Equity for New Hanover County, under the act of 1812, ch. 25, which gives to the Courts of Equity power to decree the sale of lands, where it shall appear that an actual partition cannot be made without injury to some, or all, of the parties interested. Samuel Strudwick, the elder, died in July, 1810, seised of real estate situate in the counties of Orange and New Hanover. The petitioners, and Elizabeth, wife of P. P. Ashe, were his heirs at law. Partition had been made of the real estates in Orange, by commissioners appointed for that purpose, agreeably to the provisions of the act of 1787, ch. 17. This petition was filed, praying for an order to sell the real estates in New Hanover, upon the ground that they could not be partitioned without injury to the parties interested. It appeared to the satisfaction of the Court, not only by sundry affidavits appended to the petition, but also by the finding of a Jury, that partition of the real estates described in the petition could not be made without injury to the parties interested; but, as part of the lands descended from William Strudwick had been partitioned, and those described in the petition had not then been taken into view by the commissioners, so as to enable the Court to decide, whether, (208) if *all* the lands descended had been taken into view by the commissioners, partition could not have been made without injury to any of the parties, the Court doubted whether the case of the petitioners came within the purview and meaning of the act of 1812, ch. 25, and sent the case to this Court.

BY THE COURT.—The verdict of the Jury is, that the lands cannot be divided without great injury to the petitioners, and that a sale would be greatly to their interest. This brings the case completely within the act of 1812, ch. 25, which authorises the Court to make an order of sale in all cases where an actual partition cannot be made without injury to some one, or all, of the parties interested. That the lands in Orange have been divided, makes no change in the power of the Court as to those now in question.

(209)

ALEXANDER M'KAY, ELIZA M'KAY and JOHN M'KAY *v.* WILLIAM HENDON.

From Bladen.

H having two daughters, A and B, and a son C made his will, and devised his lands to his grandson D, the son of C. The daughters A and B, survived their father: the son C died before him, whereby the grandson D, who was the devisee of the lands, became one of the heirs at law of his grandfather. A, one of the daughters, died intestate, and without issue. The mother of D married a second husband, by whom she had three children; and D having died, a question arose whether these children, being of the half-blood of the maternal line, were entitled to share in the lands devised to D, he having left at his death, his sister B, of the whole blood, him surviving. *Held*, that they were entitled under the acts regulating descents, for

D took the lands *under the will*, and not by descent. If he had taken by descent, the sister of the whole blood would exclude brothers and sisters of the half blood.

If a man devise his lands to his heirs without changing the tenure or quality of the estate, the heirs are in by descent; and so in all cases where they take the same estate by will, as they would have taken had their ancestor died intestate.

Where testator devises to his two daughters and their heirs forever, to be equally divided between them, the daughters take by descent and the devise is void; because the words of the devise make them tenants

in common, which they would be under the act regulating descents, had their ancestor died intestate.

The design of the act, in directing that the heirs shall take as tenants in common, was to exclude survivorship; for besides the unity of possession, they are assimilated to parceners by the unities of title and interest, all coming in by descent from the same ancestor, and claiming the same interest.

In the case of parceners, a devise to one is good: as, where a man having two daughters devises all to one; she shall take *all by the devise*, and shall not take a moiety by descent as heir, and a moiety by the devise; for this is not a devise to an heir, because both parceners make the heir, and the one is not an heir without the other.

Here the grandson, the devisee, was not the sole heir of his grandfather, the testator. There were two daughters, his aunts. He must, therefore, be considered as taking all the lands by purchase, and upon his death, the half blood are entitled to inherit equally with the whole blood.

Bill for partition of lands.—William James Salter, under whom Complainants and Defendant both claim, died in the year 1807, seised of the lands in question, intestate (210) and without issue. William Salter, the grandfather of the said William, died in the year 1802, having published his last will duly executed to pass his real estate, and therein he devised to the said William James, the grandson, in fee, the lands described in the bill. William Salter, the grandfather had living, at the publication of his will and at the time of his death, several daughters; and an only son Richard Salter, who was the father of William James, died in the life-time of his father, and before the publication of his will. William James had two sisters, Mary and Sarah. Mary died a minor and without issue, and Sarah intermarried with the Defendant, William Hendon. The mother of William James, after the death of her husband, Richard Salter, intermarried with Archibald M'Kay, and had issue, Alexander, Eliza and John, who are the Complainants in this case, and brothers and sister of the half blood on the maternal side, of William James. It was referred to this Court to decide, whether the Complainants be entitled to any part of the real estate of William James Salter.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

William Salter devised to his grandson, William James Salter, the land in question, and died in 1802, having, when the will was made, several daughters and one son, Richard Salter, who was the father of William James. The daughters of William survived him: his son Richard died before him, whereby William James became one of the heirs at law of his grandfather. Of the two sisters of William James, one died without issue, and the other intermarried with the Defendant. The Complainants are the children of the mother of William James, by a second marriage, and of course his brothers and sisters of the half blood of the maternal line; and the question is, whether the land shall be divided between them and the Defendant's wife, the (211) sister of the whole blood, or whether the latter shall take the whole.

If William James Salter acquired the land under the will and by purchase, the Complainants are entitled to share with the wife of the Defendant; If he acquired it by descent from his grandfather, and the will operated nothing, then the sister of the whole blood will exclude the brothers and sister of the half blood, according to the cases of Pipkin and others *v.* Coor, and Ballard *v.* Griffin. 1 Law Repos. 103. 2 do. 595. If a man devise his land to his heirs without changing the tenure or quality of the estate, the heirs are in by descent; and in all cases where they take the same estate by will, which they would have taken if the ancestor had died intestate, the law is the same. In conformity with this rule, it was decided, in the case of the University *v.* Holstead (Idem. 406), that where a man devised to his two daughters and their heirs forever, to be equally divided between them, the devise was void, and they took by descent, because the words made them tenants in common, which they would have been under the act of Assembly regulating descents, had their ancestor died intestate. It had been decided in a case some years before, that where the daughters who were the only heirs at law, had been created joint-tenants under a will made before 1784, they took by purchase. Conf. Rep. 291. And in this case, if William James Salter had been the sole heir to his grandfather, there could have been no doubt that he would have taken by descent, and the devise must have been held void. But there were several daughters of William Salter, (how many is not stated) who survived him, and who were consequently his heirs at law, together with William James, and would have been entitled to an equal share with him. Whether all the land, or an equal part, was devised to William James, does not appear from the record, and we cannot presume either way. Now although the act regulating descents directs that the heirs shall take as tenants in common, yet I apprehend the design of that was (212) only to exclude survivorship; for in reality, besides the unity of possession, they are generally assimilated to parceners by the unities of title and interest, all coming in by descent from the same ancestor, and claiming the same interest. Suppose the devise in this case to be of *all* the land which belonged to the grandfather, the testator; it may be asked, what part of it can be claimed as heir, by William James? Certainly only an equal share with the rest of the heirs; and, therefore, to view the case under the most favorable aspect, the devise could only be considered void as to that share, and the devisee would take all the rest as a purchaser under the will. But, upon the supposition that the devise is confined to such share as the devisee would have inherited, I cannot find any solid ground on which it is to be adjudged void. In the case of parceners, a devise to one is deemed good; as where one having two daughters, devises all to one; she shall take all by the devise, and shall not take a moiety by descent as heir, and a moiety by the devise: For this is not a devise to *an heir*, because *both* parceners make the heir, and the one is not an heir without the other. There can be no such descent as the descent of a moiety to one coparcener as heir. If one plead a descent "*Uni Feliæ et Cohæretti*," it will be ill. Besides, if it were held that one took a moiety by descend, it must be held, *consequently*, that the devise, as to a moiety, was void, and then that moiety ought to descent to both, as heirs to the testator, and consequently the devisee would have but three-fourths of the lands where they were devised to her *in toto*. This was determined in the case of Reading *v.* Royston. There, D C, having two daughters, one of which had issue a son, and died, devised the land to his son and his heirs forever; and the question was, whether the son should take all by the devise, or the one moiety by descent, and the other moiety by devise? for then, as to that moiety he took by descent, his aunt, the other daughter, would be coparcener with him. And it was argued, that where two titles concur, the elder shall be preferred, (213) and that as to one moiety, which the grandson had by the devise, he had the same estate in it, and none other by the devise, than he would have had without it; and therefore, since the devise worked no alteration in point of estate as to that, the grandson should take it in *potiori jure*, which was by descent. But it was resolved by the Court, that the grandson should take all by the devise, and could not take a moiety by the descent as heir, and a moiety by the devise. C. Litt. 163. b. Salk. 242. 2 Ld. Raym. 829. Much of the reasoning in these cases is applicable to the case before us, and the analogy in principle has considerable strength. The conclusion is, that William James took under the devise as a purchaser, and that the Complainants are entitled to share in the division of the land with the Defendant.

THE GOVERNOR to the use of JOHN and ALEXANDER BROWN *v.* MESHACK FRANKLIN, Executor of the last will of GIDEON EDWARDS, decesed.

From Surry.

Suit instituted on a Sheriff's bond against Sheriff and his securities. Pending the suit one of the securities dies, and a *scire facias* is ordered against his representatives; but this *sci. fa.* never issued, nor was any proceeding ever had upon the order. The suit is continued against the other Defendants for many years, and then dismissed. During the pendency of this suit, and after more than three years had elapsed from the death of one of the securities, a suit is instituted against the executor of the last will of the deceased security, and to this suit he pleads in bar the act of 1810, ch. 18, limiting the time for bringing suits on Sheriff's bonds, &c. Plea sustained; for

The act limits the bringing of the suit to three years after the right of action accrues; and neither the pendency of the suit against the other Defendants, nor the order for a *sci. fa.* to issue against the representatives of the deceased security, will take the case out of the operation of the act.

John and Alexander Brown, having recovered a judgment against James Parks, sued out a *capias ad satisfaciendum*, upon which he was arrested and committed to (214) the custody of James Fitzgerald, Sheriff of Surry county. Some time afterwards Parks was at large, and the Plaintiff in the writ of *ca. sa.* brought suit, in the Superior Court of Law for the District of Salisbury, against Fitzgerald, the Sheriff, and his securities, Gideon Edwards, Reuben Grant, James Bryson, Harden Edwards and Jacob Shepperd. The suit was brought on the Sheriff's bond, and the breach assigned was the escape of Parks. The suit was returnable to March term, 1805, and at September term following, the death of Harden Edwards, one of the Defendants, was suggested, and leave given to proceed against the others. Administration on the estate of Harden Edwards was not granted until two terms had elapsed after his death, and the suit had abated as to him. At April term, 1808, the death of Jacob Shepperd, one of the Defendants, was suggested: and at October term, 1810, the death of Gideon Edwards, another of the Defendants, was suggested. A *scire facias* was ordered against his representatives, but no return or proceeding was had thereon. At October term, 1817, the suit was dismissed at the Defendants' cost.

At September term, 1814, of Surry Superior Court, the Plaintiffs instituted this suit against Meshack Franklin, the executor of the last will of Gideon Edwards, deceased; and the Defendant pleaded in bar the act of 1810, ch. 18, entitled "An act relating to bonds given by Sheriffs and Clerks of the Superior Courts, and Courts of Pleas and Quarter Sessions." Upon the trial of the case, the Court was of opinion that the plea should be sustained. The Plaintiff appealed, and

TAYLOR, Chief-Justice, delivered the opinion of this Court:

This action is founded on a Sheriff's bond, and brought against the executor of one of the securities. The cause of action accrued before the year 1810; and the act of Assembly passed in that year, limiting such suits to a certain period, is relied on by the Defendant as a bar (215) to the action. The provision of the act of 1810, ch. 18, is express, that "all suits on Sheriff's bonds, &c. if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards." The suit, originally commenced against the Defendant's testator, abated by his death, the suggestion of which was made on the record in October, 1810; and the circumstance of its continuing to be prosecuted against the other parties, cannot affect the operation of the act upon this case—Between the abatement of the suit against Edwards, and the commencement of this action, nearly four years elapsed, whereas but three were allowed, even in an original action. The act contains no clause, upon the equitable construction of which, the right of the Plaintiffs is saved; nothing, corresponding to the sixth section of the act of limitations of 1715, allowing a year after a reversal or arrest of judgment, to commence a new suit. Nor could such a clause possibly embrace this case, on account of the great lapse of time; and it cannot be contended that the institution of a former action in time will make the present action in season.

Lutw. 261. Wilcocks *v.* Huggins. 2 Strange 907. The case is completely within the act relied upon, and there must be judgment for the Defendant.

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(216) THE STATE *v.* TIMOTHY WILLIAMSON.

From Cumberland.

Indictment charged Defendant with "feloniously stealing, taking, and carrying away, a certain Bank note, issued by the Bank of Newbern." The note offered in evidence upon the trial, purported to be issued by "The President and Directors of the Bank of Newbern.' The Defendant was acquitted, because the evidence did not support the charge. He was then indicted "for feloniously stealing, taking, and carrying away, a certain Bank note, issued by the President and Directors of the Bank of Newbern." To this indictment he pleaded "former acquittal," and, to support the plea, produced the record of the first indictment, and the proceedings had thereon. Held, that The record produced does not support the plea, and the plea overruled.

At March Term, 1816, of Cumberland Superior Court, the Defendant was indicted for "feloniously stealing, taking and carrying away, a certain Bank note, issued by the Bank of Newbern, bearing date the 6th day of November, in the year of our Lord one thousand eight hundred and nine, subscribed with the name of James M'Kinlay, President, and M. C. Stephens, Cashier, for the payment of four dollars to G. Curry, or bearer, on demand, the said Bank note being then and there of the value of four dollars, and being the property, goods and chattels, of John Ray, and the money therein mentioned, payable and secured by the said Bank note as aforesaid, then and there being due and unsatisfied, to the said John Ray, the proprietor thereof, against the form of the statute in such case made and provided," &c.

The Bank note offered in evidence upon the trial of the indictment, was in the following words and figures, to-wit:

FOUR D.

No. 413. D. 4

The President and Directors of the Bank of Newbern, promise to pay G. Curry, or bearer, on demand, four Dollars.

Newbern, the 6th day of Nov. 1809.

FOUR.

M. C. STEPHENS, *Cash'r.* JAS. M'KINLAY, *Pres.*

On behalf of the Defendant, it was insisted, that (217) as the indictment charged him with feloniously stealing, taking, and carrying away, a Bank note "issued by the Bank of Newbern," and the note offered in evidence, purported to be issued by "the President and Directors of the Bank of Newbern," the evidence did not support the charge; and of this opinion was the Court, and the Defendant was acquitted.

At September Term, 1817, the Defendant was indicted "for feloniously stealing, taking, and carrying away, a certain Bank note, issued by the President and Directors of the Bank of Newbern, of the Number 413, letter D, dated Newbern, the sixth day of November, in the year of our Lord one thousand eight hundred and nine, subscribed with the name of James M'Kinlay, Pres't." &c. pursuing the description as given in the preceding indictment.

To this indictment the Defendant pleaded "former acquittal," and the Solicitor for the State replied "*nul tiel record.*" And the record of the first indictment, and the proceedings had thereon, was offered in support of the plea. The Court was of the opinion, that the record produced did not support the plea, and the Defendant appealed.

BY THE COURT.—The record produced does not support the plea. Let the plea be overruled.

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(218)

WILLIAM SHEPPERD and others *v.* The Executor of ANDREW MURDOCK, dec'd.

From Orange.

A negro slave being mortgaged in 1784, and the parties living in the same neighborhood all the time, the mortgagor never applied to redeem until 1805. The mortgagee in answer to the application said, "he was old, and unwilling to have a law suit; and he would deliver up the negro if the mortgagor would pay the money loaned, with interest, and charge nothing for the hire of the negro.—This is a recognition of a then subsisting unsatisfied mortgage, and relieves the Court from considering whether in this country the time of redemption should be shortened, from the policy of our laws in quieting claims at law within a shorter period than is required in England.

The time is to be computed from the last period at which the parties treated the transaction as a mortgage; in an action at law, the acknowledgment of the mortgagee in this case would take the case out of the statute of limitations. For as the law requires not an express promise for the creation of a duty, but raises the promise whenever there is a sufficient legal consideration, so it will keep that promise alive, where there is an acknowledgment of a sufficient subsisting unsatisfied consideration.

Nor can it avail the mortgagee anything, that he declared he would give up the negro, to buy his peace. Things exist independent of their names; if from the nature of the thing it afford no evidence of the debt or duty, if the sole object of it was to avoid labor or expence, not from a belief of loss in the thing itself, then it can weigh nothing, because it confesses nothing; and if it be taken as the confession or acknowledgment of the party, and taken altogether, there is no debt or duty acknowledged. But if from the nature of the offer, confession or acknowledgment, the Court perceive in it an acknowledgment of the debt or duty, that weight is to be given to it, which is given to all other evidence, notwithstanding the party, at the time of making it, attempt to give it a name which he thinks will make it weigh nothing.

Complainants filed their bill to redeem a negro slave mortgaged to Defendant's testator many years before the filing of the bill; and the facts as agreed upon by the counsel were as follow,—

On the 21st day of December, 1784, William Shepperd being in possession of the negro boy Limus named in the bill, borrowed 30*l*. from Thomas Wilson, and to secure (219) the payment thereof executed to Wilson a deed in the following words, to-wit:

"Know all men by these presents, that I, William Shepperd, of Orange County, in the State of North-Carolina, have bargained, sold and delived unto Thomas Wilson of the County aforesaid, and by these presents, in plain and open market according to due form of law, have bargained, sold, set over and delivered, one negro boy Limus, about eight years of age, unto the said Thomas Wilson, for and in consideration of the sum of thirty pounds, in gold and silver to me in hand paid, by the said Thomas Wilson; and I do hereby warrant the title of the said negro boy, to the said Thomas Wilson from the right, claim or title of any person or persons whatsoever: Provided nevertheless, and it is hereby agreed by and between the said parties, that if the above said William Shepperd, his heirs or assigns, shall well and truly pay or cause to be paid unto the said Thomas Wilson, the aforesaid sum of thirty pounds, in gold or silver, with lawful interest from the date hereof, on or before the 20th day of March, next ensuing the date hereof, then and in that case, the title to the said negro boy Limus, shall revert to and be vested in the said William Shepperd, and not otherwise.—Witness my hand and seal, the 21st day of Dec'r, 1784.

"WM. SHEPPERD, (Seal.)

"Done in presence of
"WM. RAY,
"SALLY HAYWOOD."

"December 22d, 1784.

"I acknowledge to stand the risk of the within negro's life, and if he should die in the space of the time within mentioned, that it shall be my loss.
WM. SHEPPERD."

On the first day of May, 1790, Thomas Wilson assigned the said deed to Andrew Murdock, who took possession of the negro Limus immediately and continued in possession until the filing of this bill. In the fall of the year 1790, Murdock called upon Shepperd, and requested him to take the negro Limus and pay him the thirty pounds with the interest which had accrued thereon. Shepperd refused. He lived within twelve miles of Murdock's residence, and was in good circumstances, able, at any time from the year 1790 to the filing of the bill, to advance the thirty pounds and interest.

In February, 1805, Shepperd tendered the money which Wilson had loaned to him, with the interest which had accrued, and demanded the negro, and seven hundred dollars for his services whilst in Murdock's possession. (220) Murdock refused to accede to the demand; but saying that he was old and unwilling to have a law suit, he declared his willingness to deliver up the negro Limus, if Shepperd would pay him the thirty pounds with interest, and demand nothing for the negro's services.

In the fall of 1805, Shepperd filed this bill to redeem the negro, and prayed for an account. Murdock, in his answer, insisted upon the full price at which the negro had been mortgaged, upon his application to Shepperd in the year 1790, to redeem, and Shepperd's refusal, upon the lapse of time from 1790 to the filing of the bill in 1805, upon Shepperd's ability to advance the money, and the understanding of the parties as to the risk of the negro's life after the 25th of December, 1785.

It was submitted to this Court to decide, whether the Complainants be entitled to redeem; and if so, upon what principle the account for the services of the negro ought to be taken.

HENDERSON, Judge, delivered the opinion of the Court:

This must be either a contract of sale or mortgage; it cannot be both, nor can it be one without possessing all its essential requisites. The attempt, therefore, to throw on the mortgagee the risk of the life of the negro, after a particular period, and when it was a mortgage, was vain. It is true it is a circumstance to show it was not a mortgage; but it is of no avail, allowing it to be one. For it is impossible that a thing shall be and not be at the same time. Assuming this to be a mortgage, as it unquestionably is, the risk of the slave's life was with Shepperd as long as the contract continued a mortgage; that is, as long as the slave was redeemable.

The principal question in this case is, whether the equity of redemption be lost; and we are relieved from the decision of the point pressed upon the Court, that in this country the time of redemption should be shortened, from the (221) policy of our laws in quieting claims at law within a shorter period than is required in England: For we consider the transaction of 1805, a few months before this bill was filed, as a complete recognition of its being then an existing mortgage. The time is to be computed from the last period at which the parties treated the transaction as a mortgage. Here, the Defendant, Murdock, offered to surrender the slave, if the mortgage money and interest should be paid to him, and the hire given up. This is acknowledging the tenure by which he held him; that he had never foreclosed the equity of redemption, and that Shepperd had never released or abandoned it. In an action at law, where the statute of limitations were relied on, it would have taken the case out of the statute, although he demanded an exemption from the hire. For as the law requires not an express promise for the creation of a duty, but raises the promise wherever there is a sufficient legal consideration, so it will keep that promise alive where there is an acknowledgment of a sufficient subsisting, unsatisfied consideration. As if a man were to say, that "I purchased a horse of you twenty years ago, for which I agreed to give one hundred pounds; but I have never paid you, and I never will, and I shall rely on the statute of limitations." There can be no doubt but that this would take the case out of the statute of limitations, contrary to his express declaration. So Murdock refusing to deliver up the negro upon the *usual terms* of redemption, yet acknowledging enough to shew that it was an unsatisfied mortgage, shall be compelled to surrender up the mortgaged property upon the usual terms; nor can it avail him any thing, that he declared that he offered those terms to buy his peace, by way of compromise. Things exist independent of their names: their names are only to point out or designate them. The thing is not altered by its name: Call it as you please, it remains the same thing still. If from the nature of the thing it afford no evidence of the debt or duty, if the sole object in making it was to avoid (222) labour or expense, not from a belief of loss in the thing itself, then of course it can weigh nothing; because it confesses nothing, and if it be taken as a confession or acknowledgment of the party, and taken altogether, there is no debt or duty acknowledged. But if from the nature of the offer, confession or acknowledgment, call it what you will, the tribunal which decides the fact, perceives in it an acknowledgment of the debt or duty, that weight is to be given to it which is afforded to all other evidence, notwithstanding the party, at the time of making it, attempt to give it a name which he thinks will make it weigh nothing. In this case, there cannot be a doubt that the party misnamed it, in saying his only object was to buy his peace. His object was, to liquidate a claim from which he had serious apprehensions. It must, therefore, be considered as a recognition of the mortgage.

This may be called a hard case, because Shepperd lay by so long. But Murdock might have hastened him, by calling upon him in a Court of Equity, to redeem or to be foreclosed. Shepperd may, therefore, redeem upon paying the principal and interest due on the mortgage, up to the time of redemption; for his exorbitant demand for hire, discharged the virtue of the tender in 1805. Murdock must account for a moderate hire up to the same period, and be allowed for all expenditures made on the slave, of every description, and for loss of time. The Court would make Shepperd pay the costs, were it not for the precedent—Each party must pay his own costs.

(223) THE STATE *v.* WILLIAM WHITHED.

From Edgecombe.

Where the Defendant in an indictment is acquitted, or where a *nolle prosequi* is entered, he is bound to pay his own costs, and none other.

The indictment in this case was founded on the presentment of a Grand Jury. The Defendant was tried and acquitted, and a question was submitted to the Court whether he was liable for costs, and if so, what costs; and the same question was submitted in the case of *The State* v. *James Dancy*, where a *nolle prosequi* was entered.

HENDERSON, Judge, delivered the opinion of the Court:

The Defendant is bound to pay his own costs; for he incurs them by calling on those whose services he thinks he needs, and he must pay them for labor done at his request. And there is no person by whom he can be remunerated, the statute fixing the costs on the party cast not applying to the case, and it being a maxim in our law that no person recovers costs of the sovereignty. But we cannot perceive on what ground the Defendant should be subject to any other costs. There is no law, either statute or common, which makes him liable. It is true, *we suppose* that the Legislature, when they passed the act of 1800, *supposed* that the Defendant, although acquitted, was liable for all costs, except in cases where the prosecutor was ordered to pay them, and by that act exempted him from the payment of the State's witnesses: but this is supposition upon supposition. It is admitted that judicial construction or legislative understanding ought not to be departed from lightly; but in this case the Court are at a loss to point out the act which was thus interpreted. They conjecture that it was the act of 1777, directing (224) the Court in certain cases to make the prosecutor pay costs. From that it was probably thought that in all other cases the Defendant was bound to pay them. But this is mere conjecture, and is certainly too slight a ground to adjudicate on in a country governed by known laws. So far from there being any law to warrant it, every law on the subject with which we are acquainted is in opposition to it. We are, therefore, of opinion that the Defendant is bound to pay none other than his own costs.

THE STATE v. JOHN BROWN.

From Camden.

Indictment charged that the Defendant was a common Sabbath-breaker and prophaner of the Lord's day, commonly called Sunday; and that he on divers days, being Lord's days, did keep a certain open shop, and then and there sold and exposed to sale divers goods, wares and spirituous liquors, to negroes and others, to the great damage of the good citizens of the state, &c. Judgment arrested, for

Charging a man with being a common Sabbath-breaker and prophaner of the Lord's day is insufficient, as it does not shew *how or in what manner* he was a common Sabbath breaker, &c. An indictment is a compound of law and fact, and the Court upon an inspection of the indictment, must be able to perceive the alleged crime.

Charging the Defendant with keeping an open shop and selling goods and spirituous liquors to negroes and others on the Sabbath is insufficient; for if the act can be intended to be lawful it shall be so presumed; and this presumption will continue, unless the act be charged to be done under circumstances which render it criminal, and be so found by a Jury. In this case, the Defendant might have sold to persons to whom it was a merit rather than a crime to sell; and nothing shall be intended against him.

The indictment against the defendant was in the following words, to-wit:

"The Jurors for the state, upon their oaths present, that John Brown, late of the County of Camden, shopkeeper, on the first day of February, 1817, and continually thereafter up to the time of taking this inqui- (225) sition at Camden aforesaid, was, and yet is, a common Sabbath-breaker and prophaner of the Lord's day, commonly called Sunday; and that the said John Brown, on the day aforesaid, being Lord's day, and on divers other days and times, as well before as since, being Lord's day, did then and there keep and maintain a certain open shop, and on the days and times aforesaid, there sold and exposed to sale divers goods, wares and spirituous liquors, to negroes and others, to the great damage of the good citizens of this state, and against the peace and dignity of the state."

The Defendant submitted; but the Court entertaining a doubt whether the facts set forth in the indictment constituted an indictable offence as therein set forth, sent the case to this Court; and

HENDERSON, Judge, delivered the opinion of the Court:

The indictment charges that the Defendant is a common Sabbath-breaker and prophaner of the Lord's day. If it had stopped here, it would certainly have been insufficient, as it would not shew how or in what manner he was a common Sabbath-breaker and prophaner of the Lord's day. The Court upon an inspection of the record, must be able to perceive the alleged criminal act: for an indictment, as was once well observed from this bench by Judge Lowrie, is a compound of law and fact—the latter part of the indictment charges that the Defendant kept an open shop and sold divers goods, wares and spirituous liquors to negroes and others on the Sabbath. This offence, as charged, is not punishable by indictment; for if the act can be intended to be lawful, it shall be so presumed, unless it be charged to be done under circumstances which render it criminal, and be so found by a Jury. For ought that appears to the contrary, this sale might have been to the lame or weary traveler, or to others to whom it was a merit to sell instead of a crime; and nothing shall be intended against a Defendant. And if this were the Sabbath-breaking spoken of in the foregoing part of the indictment, taking the whole together, the Defendant well might have done all charged against him, and (226) yet have committed no crime; and this may have been the case, we are bound to presume it; at least not to presume to the contrary.—The judgment must be arrested.

THE STATE *v.* JAMES DODD.

From Rutherford.

Indictment charged, that Defendant falsely, wittingly, corruptly, &c. swore to certain facts before the Grand Jury upon a bill of indictment, but did not charge how or in what way, the facts thus sworn to, had a bearing upon the allegations of the indictment, nor that they were material to, or connected with, the question then under consideration by the Grand Jury. Judgment arrested.

In the absence of positive acts of the Legislature, there is no criterion by which an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is injurious to the State or to an individual, only where it tends to prevent right; therefore to constitute perjury, it must be to some material fact tending to injure some person.

The indictment charged, "that at a Superior Court of Law, opened and held for the County of Rutherford, by the Honorable Duncan Cameron, one of the Judges of the Superior Courts of Law and Equity, in and for the State of North-Carolina and County aforesaid, on the third Monday after the fourth Monday of March, eighteen hundred and sixteen, there was a bill of indictment preferred, and sent to the Grand Jury of said Court, in behalf of the State, against Joseph Hamilton and Noble Hamilton, for a charge of assault and battery, alleged to have been committed, before that time, upon the body of one James Dodd, by the aforesaid Joseph and Noble Hamilton; and the aforesaid James Dodd was introduced as a witness in behalf of the State, and was sworn in due form of law, before the Honorable Duncan Cameron, Judge as aforesaid, (he the said Duncan Cameron, then and there having full and competent power and authority to administer an oath to the said (227) James Dodd in that behalf) upon the Holy Gospel of God, to speak the truth, the whole truth, and nothing but the truth, to the Grand Jury aforesaid, touching and concerning what he the said James Dodd might know, of and concerning the charge, in the aforesaid bill of indictment contained, against the said Joseph and Noble Hamilton: and the Jurors aforesaid, upon their oath aforesaid, do further present, that the aforesaid James Dodd, being so sworn as aforesaid, and not having the fear of God before his eyes, but being moved and seduced by the instigations of the Devil, in the County aforesaid, at the term aforesaid last above mentioned, before the Court and Grand Jury aforesaid, by his own act and consent, and of his own most wicked and corrupt mind and disposition, did wilfully, wittingly, knowingly, wickedly, maliciously and corruptly swear, depose and say, and give evidence to the Grand Jury aforesaid, upon his oath aforesaid, (among other things) in substance and to the effect following, that is to say, that he the said James Dodd did not, on the night that the assault and battery was charged by him to have been committed, by the said Joseph and Noble Hamilton on the body of him the said James Dodd, see a negro woman Celia, a slave of Noble Hamilton, speak to her, or receive anything from her, and that he came to the place where he received the abuse, on his lawful business, to receive money from Mrs. Hamilton, that she owed him, and that he did not know any person was there until he was knocked down: Whereas, in truth and in fact, he the said James Dodd did see a negro woman slave named Celia, the property of Noble Hamilton, on the night and and immediately before the time that he, the said James Dodd, received the abuse from the said Joseph and Noble Hamilton, and whereas, in truth and in fact, he the said James Dodd did receive from the said negro woman Celia, a large sum of money, to-wit, the sum of ten dollars, on the same night, and before the time he the said James (228) Dodd received the abuse from the said Joseph and Noble Hamilton; and whereas, in truth and in fact, he the said James Dodd, on the night that he received the abuse, did not go to the place where he received it on his lawful business, nor to receive money which Mrs. Hamilton owed to him, but, in truth and in fact, he the said James Dodd did go to the place where he received the abuse, on the night that he received the same, and immediately before he received the same from the said Joseph and Noble Hamilton, for the express purpose, and none other, of receiving the aforesaid ten dollars, from the said negro slave Celia, and did receive the same from her, he the said James Dodd, at the time of receiving the same, well believing that the said ten dollars were feloniously stolen from the said Noble Hamilton: And so the Jurors aforesaid, upon their oath aforesaid, do say, that the aforesaid James Dodd, upon his oath aforesaid, before the Court and Grand Jury aforesaid, the said Duncan Cameron, Judge as aforesaid, then and there having competent power to administer said oath to the said James Dodd, in that behalf, in the year and at the term aforesaid, in the County aforesaid, in manner and form aforesaid, by his own act an consent, and of his own most wicked and corrupt mind and disposition, did wilfully, maliciously, wittingly, knowingly, wickedly and corruptly, commit and swear a corrupt lie, to the great displeasure of Almighty God, and against the peace and dignity of the State."

The defendant was convicted, and the case was sent to this Court upon the question, whether any and what judgment should be rendered.

HENDERSON, Judge, delivered the opinion of the Court:

The indictment charges a kind of *quasi* perjury, unknown in our laws, and entirely inconsistent with our ideas of criminal acts. For, in the absence of positive acts of the Legislature, where the will of the Legislature stands for the reason of the law, we know of no rule or criterion by which (229) an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is only injurious to the State, or even to an individual, where it tends to prevent right. Therefore, to constitute perjury, it must be to some material fact tending to injure some person. If it be entirely immaterial, it cannot affect any one: it wants a necessary ingredient to constitute it an offence against society, and that is, a possibility of injuring the community, or an individual of that community, in a manner which the good of the whole requires to be repressed. Apart from this consideration, it is not for Courts of Justice to inquire how the act stands in a moral or religious point of view.

We do not say that the facts sworn to, if false, did not amount to perjury; but that they are not so charged or averred as to shew that they constitute that crime. Without such charge or averment, the Court cannot value their tendency. The judgment must be arrested.

THE STATE *v.* HENRY WALLER.

From Edgecombe.

Indictment charged, that Defendant was a common, gross, and notorious drunkard, and that he, on divers days and times, got grossly drunk. Judgment arrested, for

Private drunkenness is no offence by our municipal laws. It becomes so, by being open and exposed to public view, so as to become a nuisance. It must be so charged, and the Jury must so find it, before the Court can render Judgment.

The indictment charged, "that Henry Waller, late of the

County of Edgecombe, yeoman, on the first day of January, in the year of our Lord one thousand eight hundred and seventeen, and on divers other days and times, as well before as afterwards, was, and yet is, a common, gross, and notorious drunkard, and that he, on the said first said day (230) of January, in the year aforesaid, and on divers other days and times, in the County aforesaid, did then and there get grossly drunk, and commit open and notorious drunkenness, contrary to morality, to the great displeasure of Almighty God, and to the evil example of all others in like cases offending, and against the peace and dignity of the State."

The Defendant submitted, and it was moved in arrest of judgment, that the offence, as charged in the indictment, was not indictable; and the case being sent to this Court,

HENDERSON, Judge, delivered the opinion of the Court: Private drunkenness is no offence by our municipal laws. It becomes so by being open and exposed to public view, to that extent that it thereby becomes a nuisance, *commune nocumentum;* and that is a question of fact to be tried by a Jury. There being no charge in this indictment to that effect, the Jury has not, and could not pass on it; which being of the very essence of the crime, the judgment must be arrested.

THE STATE *v.* SAMUEL JACKSON AND JESSE DAVIS.

From Wake.

A *scire facias* issued to shew cause why a forfeiture should not be made absolute. The Defendants showed cause, and the County Court remitted the forfeiture. The Solicitor for the State appealed to the Superior Court. In that Court, the case must be heard *de novo;* and the Defendants shew cause in the same manner as in the County Court.

The defendants were under recognizance to appear at Wake County Court, at February Term, 1818; they failed to appear, and their recognizances were forfeited. *Scire faciases* were issued, and upon their appearing in Court and shewing cause, their forfeitures were remitted. From this (231) judgment of the County Court, the Solicitor for the State appealed to the Superior Court, and the presiding Judge enquired of the Attorney General what reason he had to offer, why the judgment of the County Court should not be affirmed. The Attorney General contended, that as this was an appeal, there must be a trial *de novo* in the Superior Court, and that the defendant should be compelled to shew cause why their forfeiture should not be made absolute, in the same manner as if the *scire faciases* had issued from the Superior Court. The Judge was of opinion, that the Attorney General must shew that the judgment of the County Court was wrong; and that not being shewn, the judgment of the County Court was affirmed, and the Attorney General appealed to this Court.

HENDERSON, Judge, delivered the opinion of the Court:

Upon an appeal from the County to the Superior Court, the law directs that there shall be a trial *de novo:* that is, it shall be tried in the same manner as it should have been tried in the County Court. On the motion to remit the forfeiture in the County Court, the Defendants were bound to shew some reason or cause wherefore it should be remitted. When the case came into the Superior Court, upon an appeal, the Defendants should again, as in County Court, have shewn the reason wherefore their forfeiture should be remitted. The opinion, therefore, of the presiding Judge, was erroneous in affirming the judgment of the County Court, merely because the State did not shew it to be wrong. He should have heard the case *de novo*. The judgment of the Superior Court must therefore be reversed, and the case remanded to the Superior Court, with instructions to hear it *de novo*.

(232) THE STATE *v.* ABRAHAM HARDIE.

From Pitt.

Indictment charged the Defendant with a perjury, committed on the trial of an issue joined between the State and *six* persons, who are named. The record produced in support of this charge, shewed that on the trial docket, the case stood as one between the State and the *six* persons thus named, and in the column appropriated for pleas, the plea of "not guilty" was entered; and on the minute docket where the verdict of the Jury was spread out, the case stood as one between the State and *seven* persons. The record produced supports the allegation of the indictment; for the record shews, that an issue was joined between the State and the six persons named in the indictment, but does not shew that an issue was joined between the State and the seventh person, tried with the other six: and the Court cannot presume it.

Where a Defendant is tried, and no issue is joined, the Court will award a *venire de novo*, either to the Defendant or to the State.

This was an indictment for perjury. It charged, "that at a Court of Pleas and Quarter Sessions, held for the County of Pitt, before the Justices of the said Court, on the first Monday in August, in the year of our Lord one thousand eight hundred and seventeen, at the town of Greenville, agreeably to an act of Assembly in such case made and provided, *a certain issue duly joined in the said Court, between the State aforesaid and James Cason, Major Harris, Robert Thomas, John Hathaway, Susannah Hathaway and Lethe Cason*, in a certain plea at the instance of the State, on an indictment in which the said State prosecuted, came on to be tried in due form of law, and was then and there tried by a certain Jury of the country, in that behalf duly sworn and taken between the parties aforesaid; and upon the trial of the said issue so joined between the parties aforesaid, Abraham Hardie, late of the County of Pitt, labourer, appeared as a witness for and on behalf of the said State, in the plea and issue above mentioned and was then and there duly sworn, and took his corporal oath upon the Holy Gospel of God, before the (233) said Court, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, the said Court then and there having sufficient and competent power and authority to administer an oath to the said Abraham Hardie in that behalf," &c.

The indictment then assigned the perjury. Upon the trial, the Attorney-General offered in evidence the record of the County Court, which shewed that a bill of indictment had been preferred in that Court, and found a true bill by the Grand Jury, against all the persons named in the bill as Defendants thereto, and also against *Alafair Hathaway*. Upon the trial docket of the County Court, the case stood, "The State *v.* James Cason, Major Harris, Robert Thomas, John Hathaway, Susannah Hathaway, Lethe Cason," and this docket in the proper column, shewed the plea of "not guilty." Upon the minute docket, where the verdict of the Jury was spread out, the case stood, "The State *v.* James Cason, Major Harris, Robert Thomas, John Hathaway, Susannah Hathaway, Lethe Hathaway, *Alafair Hathaway*." The verdict was, "The Jury find the Defendants guilty."

It was objected, on behalf of the Defendant, that the record produced did not support the allegation of the indictment, as the indictment charged that the perjury was committed upon the trial of an issue joined between the State and six persons, naming them; and the record produced, shewed that a trial had been had upon an issue joined between the said six persons, and that a seventh person had also been tried as a co-defendant with the said six; and it must be taken for granted, that he also pleaded; that, therefore, the indictment did not truly recite the record.

The presiding Judge overruled the objection; and (234) the Defendant was convicted. A rule was obtained by the Defendant to shew cause why a new trial should not be granted: which rule was discharged by the Court, and the Defendant appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The indictment charges the Defendant with a perjury, committed on the trial of an issue joined between the State and six persons, who are named; and upon a reference to the trial docket of the Court wherein the issue was pending, and the trial took place, the names of the same six persons are found as parties to the issue, and the plea of "not guilty" is placed in the column appropriated for pleas. There is, therefore, no evidence, arising from the only docket where such evidence is sought for, that any plea was entered by the seventh person. And if the indictment had charged that the issue was joined between the State and seven persons, and the objection had been taken that only six had pleaded, the Attorney-General could have placed but little reliance on the circumstances now set up to prove that seven had pleaded. It may be confidently concluded from those circumstances that seven were put upon their trial, and the whole found guilty; and if it were not known, that in point of fact, it is no uncommon thing for a man to be tried on an indictment, when through inadvertence or the hurry of business, no plea has been entered, the finding of the Jury might be taken as evidence of a plea having been entered. But the contrary has been decided in this Court upon more than one occasion, where a *venire de novo* has been awarded, after a verdict for the Defendant in one instance, and for the State in another, because the docket did not shew that a plea had been entered in either. The decision of the Judge in the Court below was unquestionably correct, and the rule for a new trial must be discharged.

(235) **JOHN A. ORR *v.* ANDREW McBRYDE *et al.***

From Mecklenburg.

Appeal bond contained no covenant to perform the judgment, sentence, or decree of the Superior Court; but merely a covenant to pay all such costs and charges as by law is required in such case.—No judgment can be rendered against the securities in such bond, it not being taken in the manner prescribed by the Act of Assembly regulating appeals from the County to the Superior Court.

John A. Orr sued out an original attachment against Nathan F. Orr, and Andrew McBryde was summoned as a garnishee. Having made his garnishment, the County Court condemned in his hands, to satisfy the recovery of the Plaintiff, the sum of three hundred and seventy-four dollars. From this judgment of condemation, McBryde appealed to the Superior Court and entered into the following bond with securities, to-wit:

STATE OF NORTH CAROLINA, } November Sessions, 1814.
MECKLENBURG COUNTY. }

Know all men by these presents, that we, Andrew McBryde, (being summoned as a garnishee in the case of John A. Orr *v.* Nathan Orr) William Berryhill and William Carson, are held and firmly bound unto John Allen Orr, in the just sum of one hundred pounds, for which payment well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 30th day of November, A. D. 1814.

The condition of the above obligation is such, that whereas the above bounden Andrew McBryde hath prayed and obtained an appeal to the Superior Court to be held for the County of Mecklenburg, at the Court-House in Charlotte, on the seventh Monday after the fourth Monday in March next, in the suit wherein John A. Orr is Plaintiff, and Nathan F. Orr and Andrew McBryde as garnishee, are Defendants: now if the said Andrew McBryde garnishee aforesaid, do prosecute said appeal with effect, then the above obligation shall be void; otherwise to pay all such costs and charges as by law in such case is provided

AND. McBRYDE, (Seal.)
WM. BERRYHILL, (Seal.)
WM. CARSON, (Seal.)

Witness,
ISAAC ALEXANDER.

The judgment of the County Court having been (236) affirmed by the Superior Court, the Plaintiff sued out a *scire facias* against the securities for the appeal, to shew cause why judgment should not be entered up against them for the amount for which it had been rendered against the Appellant, Andrew McBryde: and they shewed for cause that the appeal bond was not taken pursuant to the directions of the Act of Assembly regulating appeals.—The case was sent to this Court, and

BY THE COURT.—This case is not to be distinguished from that of Forsyth *v.* McCormick, (2 Law Repos. 472) where the condition of an appeal bond expressed in the same language with this, was held to be too great a departure from the act of Assembly prescribing the form, and essentially in not securing the main purpose for which an appeal bond is required. This bond contains no covenant to perform the sentence, judgment or decree of the Superior Court.—Judgment must be entered for the Defendants.

(237)

ARTHUR CLARKE, *qui tam*, &c. *v.* RUTHERFORD.

From Burke.

Action of debt on the statute of usury; pleas, general issue and statute of limitations. Motion by plaintiff to amend the pleadings by replying to the statute of limitations, "a former suit between the same parties, and a non-suit therein, and that this action was brought within a year and a day thereafter, according to the provisions of the act of 1715." Motion disallowed; for,

1. The amendment, if made, would be unavailing. The statute limiting penal actions contains no such saving as the Plaintiff wishes to reply, nor a saving of any description; nor is it in *pari materia* with the act of 1715.
2. The nature of this action forbids the amendment. This was no particular man's cause of action until brought. It became his by the suit, and he lost it by the dismission. It then became common and liable to be brought by any person. If brought by a stranger, it was a new suit; so, if brought by the same person. It was not a continuance of his old suit; for it was his no longer than it depended.

This was an action of debt founded upon the statute against usury. The Defendant pleaded "the general issue and statute of limitations." The case came on to be tried at the next term after the pleas were pleaded, when the plaintiff moved, as there was no replication stated in the pleadings, that he be permitted to have the benefit of a replication "of a former suit between the same parties, and a non-suit therein, and that this action was brought within one year thereafter, according to the provisions of the act of 1715;" or, if not permitted from the present state of the pleadings to have such benefit, that he be permitted to amend by adding such replication. The motion was sent to this Court, and it was agreed that if this Court should be of opinion against the plaintiff upon both points, a non-suit should be entered.

HENDERSON, Judge, delivered the opinion of the Court:

In this case, which is brought by a common informer on the statute of usury, application was made at a term subsequent to the making up of the pleadings, to reply to (238) the statute of limitations, that he the informer heretofore brought suit for the same cause of action against the Defendant, that that suit went off otherwise than on its merits, and that the present suit was brought within a year and a day of its determination.

It is a rule of our Courts, founded on common sense, to admit of no amendment which would be unavailing. For wherefore should a thing be done when it can profit nothing? The statute pleaded in this case, contains no saving such as the Plaintiff wishes to reply, nor, in fact, a saving of any description; nor is it in *pari materia* with the act of 1715; for nothing is there said of limiting penal actions. But if there were any doubt in applying the savings under the act of 1715, to subsequent statutes of limitations, limiting the time of bringing actions not enumerated in the act of 1715, the *nature of this action* forbids it. This was no particular man's cause of action until brought. It became the informer's by the suit; and he lost it by the dismission. It then became common, and liable to be brought by any person. If brought by a stranger, it was a new suit: so if brought by the same person. It was not a continuance of his old suit; for it was no longer his than it depended. Suppose after the dismission of the first suit, some third person had commenced one before the commencement of the present action; must his suit be discharged, because the present plaintiff afterwards brought his? Or, must his suit be suspended until the year and the day expire, to see whether the old informer intend to commence again? These are all strong reasons why there should be no saving in the words of the statute, and they are still stronger why they should not be inserted by judicial construction. Let the motion to amend be disallowed.

(239) JOHN DOUGLAS *v.* WILLIAM MITCHELL.

From Person.

The Plaintiff being a Constable, levied an execution on the Defendant's Horse. It was agreed between them, that Defendant should ride the horse home, and the Plaintiff wait for the money. After the Defendant took possession of the horse, Plaintiff seized him and claimed to hold him under the execution. Defendant by violence disengaged the horse from the Plaintiff and rode him off. Plaintiff brought trover for the horse, and he is entitled to recover; for

His agreement with the Defendant is a mere voluntary courtesy, not binding on him. The execution remained unsatisfied, and its efficacy unimpaired, and justified the Plaintiff to re-seize the horse. If, therefore, it be conceded, that the first levy of the execution was discharged by the agreement, the second seizure re-vested the property in the Plaintiff.

This was an action of trover for a horse. The Plaintiff being one of the Constables of Person County, had in his hands a writ of *fieri facias* against the property of the Defendant, which he levied on the horse. After the levy, the Defendant requested to be permitted to retain the possession of the horse, and it was agreed between him and the Plaintiff, that the plaintiff should call the next day at his house, and receive the money due on the execution; and if the Defendant could not then pay it, the Plaintiff would wait two or three weeks, and the Defendant might take the horse and ride him home. The Defendant then delivered the horse to a boy, who was holding the bridle, when the Defendant said, he would ride the horse home, and went towards the horse for that purpose. The Plaintiff followed, and taking hold of the bridle, claimed to retain the horse by virtue of the execution, and requested the Defendant to surrender him. The Defendant refused, insisting on the agreement, and threatening violence to the Plaintiff if he did not give up the bridle. The Plaintiff declared that he was doing his duty as enjoined by the execution, and that he would not let the horse go out of his possession. The Defendant (240) drew a sword, and giving the plaintiff a stroke with it, disengaged his horse and rode him off.

The Counsel for the Defendant insisted, and requested the Court so to instruct the Jury, that the agreement operated to discharge the levy, and re-vest the property of the horse in the Defendant, and that the Plaintiff could not re seize the horse until the agreement expired. The Court refused so to instruct the Jury, saying that the agreement was not obligatory upon the Plaintiff as a contract, for want of a consideration. The plaintiff might, at his own risk, have suffered the horse to remain with the Defendant; but then the Defendant's possession would have been upon the plaintiff's licence, and the Plaintiff might, at any time, deprive him of it. That besides this view of the case, the Plaintiff might, after the agreement, make a second seizure, and, having done so, that vested the property in him, and entitled him to recover in this action, although it should be conceded, that the agreement discharged the first seizure. There was a verdict for the Plaintiff; and a rule for a new trial being granted to the Defendant, and, on argument, discharged, the Defendant appealed; and

HENDERSON, Judge, delivered the opinion of this Court: It may be conceded, without prejudice to the Plaintiff's right of recovery, that the first levy was raised or discharged by the agreement stated in the case; yet the Plaintiff is entitled to recover on the second seizure or levy. For that which is called a raising of the first levy, was a mere unexecuted voluntary courtesy, which might, at any time, be revoked at the pleasure of the officer. But suppose the officer had actually restored possession of the horse, and had agreed to wait two or three weeks, or for any other period, the execution was not thereby satisfied, or its efficacy impaired; which is the true criterion whereby any acts under it are to be tested: and it remained in full force and vigour, and not only justified the making of the seizure, but required it. Upon (241) every principle, the Plaintiff is entitled to recover.

E. L. ERWIN *v.* SAMUEL MAXWELL.

From Burke.

Warranty in the sale of a horse. When the purchase-money was about to be paid, the buyer asked the seller, if the horse was sound; the seller answered, he was. The declaration charged that the horse was unsound, lame, stiff and defective in all his limbs. Plaintiff nonsuited; for

1. The conversation about the soundness took place after the contract of sale had been entered into.
2. The answer of the seller to the question of the buyer, whether the horse was sound, does not amount to a warranty; for, to constitute a warranty, it must be express; it will not be implied by a mere affirmation of the quality or kind of the article sold, nor by a mere affirmation of the value, nor where the subject is of dubious quality, on which common judgment might be deceived: and the reason is, that as a warranty renders the party subject to all losses arising from a

failure of it, however innocent he may, Courts of Law are cautious in creating an obligation of such extent.

Without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects; the principle on which the common law proceeds, being, that the purchaser ought to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention.

To make an affirmation at the time of the sale, a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment and opinion.

This was an action of assumpsit on a warranty in the sale of a horse. The declaration charged that the Defendant did warrant and affirm to the Plaintiff, that the horse was sound, except that he had been badly cut for the hooks, which gave his eyes a bad appearance; and it further charged that at the time of the sale and warranty the horse was lame, stiff and defective in all his limbs and feet, so that (242) he could not travel well, and became of little use to the Plaintiff. The evidence on the trial related to a conversation between the Plaintiff and Defendant, when they went together into a room to pay and receive the purchase-money, after the agreement relative to the sale had taken place; upon which conversation, the Plaintiff asked the Defendant if the horse he was about to let him have was sound, to which the latter answered, he was. Afterwards the Plaintiff told the Defendant that some persons disliked the appearance of his eyes; to which the Defendant answered, his eyes were good, for any thing he knew to the contrary, that he had been badly cut for the hooks, and advised the Plaintiff not to let any person have any thing to do with him, except a skillful hand It did not appear in evidence whether the conversation respecting the eyes, took place before the payment of the money, or at the time.

The presiding Judge nonsuited the Plaintiff; a rule for a new trial being obtained, it was sent to this Court; and

TAYLOR, Chief-Justice, delivered the opinion of the Court:

A few plain principles have been established by many decisions, on the subject of warranty, the application of which to this case will free it from difficulty. As a warranty renders the party subject to all losses arising from a failure of it, however innocent he may be, much caution has been exercised in Courts of Law in creating an obligation of such extent. Hence the rule that on the sale of chattels, there is not any implied warranty, except as to the title; that to constitute a warranty it must be express, and will not be implied by a mere affirmation of the quality or kind of the article sold, nor by a mere affirmation of the value, nor where the subject is of dubious quality, on which common judgment might be deceived. Therefore when an auctioneer, on the sale of pictures, set in the printed catalogue opposite to each, the name of a painter, it was determined not to (243) amount to a warranty of the picture's being the work of such artist. 2 Esp. Rep. 572. In every case upon the sale of a chattel, where there is neither a warranty nor deceit, the buyer purchases at his peril. In the case of Chandler *v.* Lopez, (Cro. Jac.) it was determined that for selling a jewel, which was affirmed to be a bezoar stone, when it was not, no action lay, unless the Defendant knew it was not a bezoar stone, or had warranted it to be one. And in Packinson *v.* Lee, (2 East. 314) it was decided that a fair, merchantable price did not raise an implied warranty; that if there be no warranty, and the seller sell the thing such as he believes it to be, without fraud, he will not be liable for a latent defect. Lord Coke says, "that by the civil law, every man is bound to warrant the thing that he selleth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty in deed or in law." And Fitzherbert, in the Nat. Brev. 94, c. says, "that if a man sell wine that is corrupted, or a horse that is diseased, and there be no warranty, it is at the buyer's peril, and his eyes and his taste ought to be the judges in that case." It appears from all the authorities, that without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects; and a contrary rule is no where laid down.—The principle, on which the common law proceeds, being, that the purchaser ought to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. The purchaser may always provide against his own want of vigilance or skill, by requiring the vendor to warrant. Saying, when the money was paid, that the horse was sound, did not amount to a warranty; to make an affirmation at the time of the sale, a warranty, it must appear by evidence to be so intended, and not to (244) have been a mere matter of judgment and opinion. 3 Term Rep. 57. Carth. 90. Salk. 210. Here the Plaintiff seemed content with the assertion of the Defendant as to the soundness of the horse, though he had been previously advised to take a warranty. If, then, the Defendant asserted only what he believed, and the contrary does not appear; and the Plaintiff chose to run the risk of being able to prove that the Defendant knew of the unsoundness, when he might have procured an indemnity, with or without that knowledge, there is neither hardship nor injustice in throwing the loss on him. The nonsuit must, therefore, stand, and the rule for a new trial be discharged.

CHARLES STEWART *v.* THOMAS H. DAVIS.

From Craven.

The plaintiff occupied a lot in the town of Newbern, as lessee of the Trustees of the Newbern Academy, and the Defendant being Sheriff of Craven County, seized the Plaintiff's goods by distress for a tax alleged to be due upon part of the lot. The lot was granted for the use of the Academy before the revolution. It does not adjoin the lot on which the Academy is erected.—This lot is not exempted from taxes by the act of 1806, ch. 3, which declares that "all houses and lots, or other real or personal estate appertaining thereto, set apart and appropriated to divine worship, or for the education of youth, shall be exempted from all taxes." For

It was the design of this act to exempt from taxes only that property which was specially and exclusively set apart and appropriated to divine worship and education, and directly employed for either of these purposes: as the lot on which the Church or Academy stands and the grounds appurtenant, if employed as a church-yard, minister's residence, or for the recreation or nourishment of youth.

This was an action of trespass for taking away the Plaintiff's goods. The Defendant being Sheriff of the County of Craven, seized the said goods by distress, for a tax alleged to be due upon a part of a lot in the town of New- (245) bern, occupied by the Plaintiff as lessee of the Newbern Academy. The Trustees of the Newbern Academy are a corporation created by law for the education of youth, and the lot in question is part of funds granted to the said corporation before the revolution, to enable the same more effectually to answer the ends of its institution. The lot does not adjoin that on which the Academy itself is erected. It was agreed, that if the Court should be of opinion that the premises in occupation of the Plaintiff, were liable to taxation, judgment should be rendered for the Defendant; if otherwise, then for the Plaintiff, with six-pence damages and costs.—The case was ordered to be sent to this Court; and

TAYLOR, Chief Justice, delivered the opinion of the Court: It is contended by the Plaintiff that the lot which he occupies as lessee of the Trustees of the Newbern Academy, is exempted from taxation by the words of the act of 1806, ch. 3. The tenth section of the act is in these words: "All houses and lots or other real or personal estate appertaining thereto, set apart and appropriated to divine worship, or for the education of youth, shall be, and the same are hereby exempted from all taxes whatsoever." It was the design of this law to exempt from taxes only that property, which was specially and exclusively set apart and appropriated to divine worship or education, and directly employed for either of these purposes; as the lot on which a church stands, which would include the church-yard, and the minister's residence, if the latter be an appurtenance to the principal lot; or an Academy and the lot on which it is built, and the grounds appurtenant to it, if employed in the purposes of education, as for the residence of the teachers, or towards the recreation or nourishment of the youth. If the Academy lot and its appurtenances were sold, whatever would pass under the name of an appurtenance, comes within the fair scope of its exemption. But a corporation may own, and in point of
(246) fact some do own, real property, which is rented out for sums more than sufficient to meet any demands arising from the objects of their incorporation; and if the Legislature intended to exempt *all* the property of a corporation from taxation, they would probably have used words of larger compass than those contained in this law. It is most clear, that if the trustees were to grant the Academy lot, the lot occupied by the Plaintiff would not pass with it; because it does not appertain to the lot which is set apart and appropriated for the education of youth.—The Defendant is entitled to judgment.

JOSEPH WATT *v.* JAMES GREENLEE AND ASA MARTIN.

From Burke.

Where, upon the trial of a State's warrant for larceny, the Justice records the testimony of the prosecutor, the person prosecuted may, in an action for a malicious prosecution, give such parol evidence of this testimony, as is consistent with the written statement, and tends to a more exact specification of the thing stolen.

This was an action to recover damages of Defendants for having prosecuted maliciously the Plaintiff for larceny. Upon the return of the State's warrant against the Plaintiff, before a Justice of the Peace, Asa Martin, one of the Defendants in this action, appeared and gave evidence, and his evidence was reduced to writing by the Justice, and returned to Court. As written, it stated, that about the last of September, 1811, Benjamin Garrish brought to him a piece of a band that belonged to a hammer shaft of certain Iron Works that had been destroyed by a freshet: that he, the witness, made scallop iron of the piece of band for Joseph Watt, and Garrish said he brought the piece of band to the shop, for and at the request of Joseph Watt. Watt was prosecuted for stealing this piece of iron, and acquitted; and then instituted (247) this suit. Upon the trial, a witness was admitted by the Court, to prove, that before the Justice, Asa Martin swore, that the iron he charged Joseph Watt with stealing, was the front hoop of a hammer-shaft. The introduction of this evidence was objected to, on the ground that the testimony given by Martin before the Justice, had been reduced to writing by the Justice, and that did not state the fact as sworn to by the witness. There was a verdict for the Plaintiff; and a rule for a new trial being obtained, on the ground of improper evidence having been received by the Court, the same was discharged, and the Defendants appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

This was an action for a malicious prosecution, wherein a verdict was found for the Plaintiff, and upon a motion for a new trial being overruled, the Defendants appealed. The ground of the motion was the admission of improper testimony by the Court, in allowing a witness to prove, that on the trial before the magistrate, the Defendant, Martin, stated, that the iron he then alluded to, was the front hoop of a hammer-shaft; whereas, the statement of his evidence returned by the magistrate was, that Garrish brought to him a piece of a band that belonged to the hammer-shaft after the iron works were destroyed. The question does not arise in this case whether parol evidence is admissible to contradict the written statement by the magistrate; for the evidence received is entirely consistent with it, and tends only to a more exact specification of the iron described by the party. A piece of a band that belonged to a hammer-shaft, may be the front hoop of the shaft; and if Martin did, in truth, so describe it, and it became necessary on the trial of the cause, that the very description he gave, should be repeated, there is nothing to forbid such evidence. We, therefore, think the rule for a new trial should be discharged.

(248) BENJAMIN JOHNSTON *v.* WILLIAM MARTIN.

From Iredell.

In an action for a malicious prosecution, the dismissal of a State's warrant by the magistrate who tried it, is *prima facie* evidence of the want of probable cause; and throws upon the prosecutor the burthen of proving that there was probable cause.

The Plaintiff, who was an overseer of a road, sued out a warrant against the Defendant, who was one of the hands attached to the road, for the penalty given by the act of Assembly against delinquent hands, and charged him with a delinquency of four days. This delinquency the Plaintiff proved by his own oath, and recovered a judgment for the penalty. The Defendant afterwards obtained a warrant from a magistrate, charging, that in his belief the Plaintiff had sworn falsely against him upon the trial of the warrant. The Plaintiff was arrested and taken before two magistrates for examination, and dismissed by them, after hearing the evidence of the prosecutor and another witness. The Plaintiff then brought this action for malicious prosecution, and, upon the trial, proved by the magistrate who issued the warrant, that the Defendant when he obtained it, and also on his examination, stated that the Plaintiff had sworn falsely in charging him with more days than he had a right to do. The other magistrate proved, that the Defendant charged the Plaintiff with swearing falsely, in charging him with four days' failure, when the Plaintiff had not worked four days on the road. Another witness proved that the Defendant admitted he had been notified to work on the road for three days during the year, but that the Plaintiff had sworn to more days than he had a right to charge him with. Satisfactory proof was given that the Plaintiff had worked the four days on the road. The presiding Judge instructed the Jury, that the dismissal of the warrant by the magistrates, was no evidence of the want of probable cause. There was a verdict for the Defendant, and a rule for a new (249) trial was obtained on the ground of misdirection by the Court. The rule was discharged, and the Plaintiff appealed.

TAYLOR, Chief Justice, delivered the opinion of the Court: It is well settled that in this action malice and the want of probable cause must both concur, otherwise the action will not lie. Malice alone is not sufficient; because a just accusation may be made from malicious motives. Nor is the want of probable cause alone sufficient. But as malice is express or implied, it is frequently implied from the want of probable cause. Whether there be probable cause for the prosecution, must depend on all the circumstances of the case; but that which indicates its absence most strongly, is the discharge by the magistrates, after a full and fair examination of the evidence. This discharge proves a presumption in favor of the Plaintiff's innocence; for, until it took place, it could not be inferred that the charge against him was without probable cause. Hence the necessity of always stating in the declaration that the Plaintiff had been discharged from the prosecution; and when that is proved, as it always must be, it certainly amounts to *prima facie* evidence of the want of probable cause. As it is not necessary to prove express malice in this action, to the support of which, implied malice is sufficient, the discharge of the Plaintiff, resulting from the absence of any proof of his guilt, was one circumstance from which that implication might arise. It should have been stated to the Jury, as *prima facie* evidence of the want of probable cause, and then the *onus* of proving the existence of probable cause, would have been thrown on the Defendant. A new trial is therefore awarded, and upon the trial of the cause, the Jury ought to be instructed that the dismissal of the Plaintiff by the magistrates, was *prima facie* evidence of the want of probable cause.

(250)

Den on demise of AQUILLA OXLEY *v.* MIZLE *et al.*

From Bertie.

In an action against an executor, the Jury find that he has fully administered. A *scire facias* issues against the devisees, to shew cause why the Plaintiff shall not have judgment of execution against the lands devised. The *sci. fa.* is returned "executed" generally. The devisees plead to the *sci. fa.* and a collateral issue is made up between them and the executor, to-wit, "whether the executor has fully administered?" This issue is found in favor of the executor, and the Plaintiff has judgment of execution against the lands devised. The execution is levied upon lands in the hands of one of the devisees who was a minor, and has no guardian, and who appeared and made defence to the *sci. fa.* by attorney, and not by guardian. The lands are sold and purchased by a stranger. His title is good; for

Whatever irregularity there may be in the judgment, it is the act of a Court of competent jurisdiction, unreversed and in force when the sale was made.

The execution gave the Sheriff authority to sell, and though the judgment were afterwards reversed, or set aside, the title of an intermediate purchaser at the Sheriff's sale, shall not be prejudiced.

The same principle applies to an error in the execution, the regularity of which cannot be questioned in an action against a purchaser at a Sheriff's sale.

An execution issuing after a year and a day, is only voidable at the instance of the party, against whom it issues.

If a writ be not void, however irregular it may be, the purchaser, being a stranger, will gain a title under the Sheriff's sale.

On the trial of this ejectment, the lessor of the Plaintiff claimed title to the lands in question, as devisee of John Oxley, his father. The defendants claimed title under a deed executed by the Sheriff of Bertie; to support which deed they produced the record of the County Court of Bertie, from which it appeared that one Stephen M'Dowell had brought an action of assumpsit against the executor of John Oxley, on the trial of which, the Jury found that the Defendant's testator did assume, and they assessed damages: they further found that the Defendant had fully administered, and had not assets of his testator to satisfy any part of the damages of the Plaintiff. The Plaintiff then sued (251) out a *scire facias* against the devisees of the testator, of whom the lessor of the present Plaintiff was one, to shew cause why he should not have judgment of execution against the lands devised. This *scire facias* was returned by the Sheriff "executed," generally. The devisees appeared by an attorney of the Court, and pleaded to the *scire facias*, "that the executor had assets to satisfy the damages recovered by the Plaintiff" And issue was made up between the devisees and executor, to try whether the executor had fully administered. This issue was found in favor of the executor; whereupon the Court gave judgment of execution against the lands devised for the damages and cost. A *fieri facias* was issued, and the lands in the hands of the present lessor of the Plaintiff, were levied on and sold by the Sheriff. The defendants claim under the deed which the Sheriff made in pursuance of this sale.

The lessor of the plaintiff then proved, that during all these proceedings he was a minor, under the age of twenty-one years, and had no guardian. The record shewed, that to the *scire facias* he appeared and made defence by attorney, and not by guardian; that the *scire facias* issued against him, and was served on him, as a person of full age.

On this statement of facts, the presiding Judge directed the Jury to find for the Defendant. A rule for a new trial was obtained on a ground of misdirection by the Court. This rule was discharged, and the lessor of the Plaintiff appealed.

TAYLOR, Chief Justice, delivered the opinion of the Court:

Whatever irregularity there may be in the judgment on which the execution issued, it was the act of a Court of competent jurisdiction, and was unreversed and in force, when the sale was made to the Defendant. The execution gave the Sheriff full authority to sell, and though the judgment should be afterwards reversed or set aside, yet the title of an intermediate purchaser at the Sheriff's sale, cannot (252) be prejudiced. "The sale shall stand, otherwise none will buy any thing upon execution." *Manning's case,* 8 *Co.* The same principle applies to an error in the execution, the regularity of which, it has been held, could not be questioned in an action of ejectment against a purchaser under a Sheriff's sale. And an execution issuing after a year and a day, without a revival of the judgment by *scire facias*, is only voidable at the instance of the party against whom it issues. 8 John, 361, 13 Id. 97. If the writ be not void, however irregular it may be, the purchaser will gain a title under the Sheriff's sale. 1 Ves. 195. 1 Maule & Selwyn, 425. The law on this point is considered to be settled; and the Court are of opinion, that the instructions of the Judge to the Jury were entirely correct. The rule for a new trial must be discharged.

WILLIAM W. RODMAN *v.* HENRY AUSTIN.

From Halifax.

Under the act establishing the Supreme Court, a Judge of that Court cannot award a Writ of Certiorari in vacation. Application for the Writ must be made to the Court.

The statement of a case by the presiding Judge, if not certified or referred to in the transcript, as part of the record, cannot be taken notice of by this Court, and this Court, upon a view of the record, must pronounce the same judgment that the Court below ought to have pronounced.

William W. Rodman exhibited to the honorable John Hall, one of the Judges of this Court, in vacation, an affidavit complaining of a certain judgment rendered against him in the Superior Court of Law for Halifax County, at the instance of Henry Austin, and stating the facts upon which his complaint was founded. He prayed for a Writ of *Certiorari*, to have the case brought up to this Court. His Honor doubted whether, under the act of Assembly estab- (253) lishing this Court, a Judge in vacation was authorized to award a Writ of Certiorari: he, however, did award it, with a view of having the opinion of the Court upon the question. Upon the return of the Writ, the Court after consideration, were of opinion that applications for Writs of Certiorari must be made to the Court; and thereupon the affidavit of Rodman being read, a motion was made on his behalf, that a writ of Certiorari be awarded: and it was agreed, in considering this motion, the Court might look into the record which had been certified to this Court by the Clerk of the Superior Court of Law for Halifax, and if they should be of opinion, upon an inspection of the record that they could not grant to Rodman a new trial, the motion for the Writ should be disallowed. Accompanying the transcript of the record, was a statement of the case, signed by the Judge who tried the cause; but it was not certified as a part of the record, nor referred to it in the transcript. It was therefore contended on behalf of Austin, that it formed no part of the record referred to this Court, and that this Court, under the act establishing it, could look to nothing but the transcript of the record certified by the Clerk of Halifax Superior Court; and this being examined, it shewed the writ, declaration, proceedings in the case up to final judgment, and a motion for a new trial, which was disallowed. It contained no statement of the case, to enable this Court to decide whether the opinion of the Judge who tried it, upon the several points stated in Rodman's affidavit, was correct or not.

HENDERSON, Judge, delivered the opinion of the Court:

This is a motion for a Certiorari, grounded on the papers returned to the present term between the same parties. Those papers are the plaintiff's affidavit, the record of a suit in Halifax Superior Court, between Austin, Plaintiff, and Rodman Defendant, with a statement of the presiding Judge. From a view of these papers, we are of opinion, that a Certiorari should not issue; for it would be entirely use- (254) less. The record does not exhibit those grounds of complaint stated in the affidavit, and we must, upon a view of it, pronounce the same judgment that was pronounced in the Court below, whatever might be our opinion if the Judge's statement formed a part of the case.—But so far from its being entered on the record, it is not even referred to; and we cannot perceive how we can incorporate it with, or make it a part of the case. It might possibly be made at the time the cause was tried, or it might have been made a month afterwards. It would, therefore, be vain and useless to issue the writ. The motion must be disallowed.

ROBERT FELLOW *v.* ANTHONY FULGHAM.

From Wayne.

Petition filed under the act of 1809, ch. 15, to recover damages of the owner of a mill, for overflowing the Plaintiff's lands. Pending the petition the Defendant dies, and a *scire facias* issues to his heirs to make them parties. Scire facias dismissed; for

The act does not direct them to be made parties; and by the common law, the heir is in no case liable for the tort of his ancestor.

The act of 1805, ch. 8, provides against the abatement of actions brought for an injury done to real property, where the Defendant dies; but the revival must be by the representatives.

Executors and Administrators act in *autre droit*, and maintain the rights of their testators and intestates; but an heir, who enters on the death of his ancestor, becomes seized in his own demesne, and does not claim to hold the land in right of another.

The Plaintiff filed his petition in the County Court of Wayne, under the act of 1809, ch. 15, to recover damages for the overflowing of his lands. The Defendant appealed from the judgment of the County Court, and pending the suit in the Superior Court, he died.—The Plaintiff sued out a *scire* *facias* against his heirs, to make them parties; and (255) a question arose whether the heirs or the representatives of the deceased should be made parties. The Court dismissed the *scire facias*, and the Plaintiff appealed.

TAYLOR, Chief Justice, delivered the opinion of the Court: This is a proceeding by petition under the act of 1809, ch. 15, to recover damages against the owner of a mill for an injury done to the plaintiff's land. Upon the death of the Defendant, a *scire facias* was issued to his heirs to make them parties, and the question presented for decision is, whether the suit can be revived against the heirs. Upon principle, it is clear that the suit cannot be carried on against the heirs. For, by the common law, the heir is in no case liable for the tort of his ancestor. The act of 1805, ch. 8, would operate to prevent the abatement of an action brought for an injury done to real property, where the Defendant died: but then it must be revived against the representatives. The act under which this proceeding is instituted, gives a remedy of a peculiar kind, unknown to the common law, and is exclusive of the remedy by action, in all cases where the damages assessed by the Jury are less than ten pounds. It may be just and convenient to make the heir pay the damages during the period he received benefit from the mill; but it cannot be done without a legislative enactment, which is not less necessary in this case than in the various others, by which particular actions have been withheld from abatement. But because provision has been made in some cases that executors and administrators may prosecute or defend certain actions, which survive the death of the party; or because the action of ejectment may be revived against the heirs or devisees of the Defendant, the Court is not at liberty to pronounce that the petition in this case should be revived against the heirs. Executors and administrators act in *autre droit*, and maintain the rights of their testators and intestates: but an heir who enters on the death of his ancestor, becomes seised in his own demesne, and does not claim to hold (256) the land in right of another. And whenever a statute does not authorise heirs to prosecute or defend a petition, prosecuted by or against their ancestor, it is clear that they can have no right to do so.—The *scire facias* must be dismissed.

JOSEPH AND WILLIAM PEACE *v.* WILLIAM JONES.

From Wake.

A garnishee summoned upon an attachment stated that the debtor had executed to him certain deeds of trust for real and personal property, to secure three of his creditors; which property was sold at public sale upon a credit, the purchasers giving notes negotiable at the State Bank. That the sums secured by the deeds of trust had been discharged by a like amount out of the proceeds of the sale, leaving a surplus of 1,208 dollars 20 cents, for which A. B. had given two notes payable to C. D. who had indorsed them in blank. A. B. was also summoned as a garnishee, and declared his willingness to pay the money on the notes. The Plaintiffs in attachment are entitled to have judgment of condemnation of this money; for,

If the garnishee had received the surplus in money, the purposes of the trust deeds being satisfied, it would have been money received to the use of the debtor, and might by him have been recovered in *indebitatus assumpsit.*

The law is the same, whether the surplus be in money or in notes, and, upon a refusal to deliver the latter, the debtor would be entitled to an action of trover.

The attachment law makes notes not yet due, whether given for money or specific articles, subject to that process. And it is no objection that the notes are given for the purchase of property in which the debtor had only an equitable interest.

Whether the property be liable to execution, is not the criterion to determine whether it be attachable, otherwise the attachment law could not operate upon bonds and simple contract debts, &c.

As soon as the purposes of the trust deeds were satisfied, there was but one equity remaining, and that was in the debtor, whose right to the money, had it been received, could have been enforced at law.

The Plaintiffs were creditors of the Defendant by specialty to the amount of $363 87, and sued out an original attachment against his effects, which was levied upon (257) sundry articles, and Peter Browne, Esq. was summoned as garnishee. The subject of his garnishment, upon which the questions submitted to this Court arose, was, that prior to his being summoned as garnishee, Jones had executed to him certain deeds of trust, for real and personal property, to secure three of Jones's creditors; which property was sold at public sale upon a credit of three and six months, the purchasers giving notes negotiable at the State Bank. That the sums secured by the deeds of trust had been discharged, by a like amount out of the proceeds of the sale, leaving a surplus of $1,208.20, for which R. Cannon gave two notes payable to W. Rogers, who had indorsed the same in blank; that he had no beneficial claim upon the property of Jones, nor did he believe that the creditors, for whose benefit the deed had been taken, had. But he submitted to the Court, whether any process from a Court of

Law could affect the equitable interest which Jones had in the personal property contained in the deed; and whether the two negotiable notes were liable to the Plaintiff's demand, although they were taken for the balance of the Defendant's equitable interest in certain real estates, inasmuch as that balance, in virtue of a prior equity, had been converted into personal property. The question arising on Mr. Browne's garnishment, were referred to this Court, and

TAYLOR, Chief Justice, delivered the opinion of the Court:

If Mr. Browne had received the surplus in money, the purposes of the trust deeds having been executed and extinguished, it would have been so much money received to the use of Jones, and might have been recovered by him in *indebitatus assumpsit:* the law in such case, implying a promise to pay. For the quality of every such trust is, that what remains after paying the creditors, belongs to the assignor. And although the usual remedy against a trustee, for a misapplication of the trust fund, is by a bill in equity, (258) yet at law, an action of assumpsit will lie. 5 Term Rep. 601, Willes 405. The law must be the same, whether the surplus be in money or in notes, and upon a refusal to deliver the latter, Jones would be entitled to an action of trover; Salk. 130, 282, for the garnishment proves that the notes belong to him. It seems to be a better criterion, whether property be liable to attachment, to ascertain what would be the rights of the Defendant in the attachment against the garnishee, than to enquire, whether the property would be liable to an execution against the Defendant. For the attachment law makes notes not yet due, whether given for money or specific articles, subject to that process; which things clearly cannot be taken in execution. But, if the property being liable to execution, were a test of its being attachable, it would hold good in this case, as to all the property in the garnishee's hands, which was not necessary to satisfy the creditors; and if a levy had been made by a creditor of Jones's upon the property, before the sale, the surplus, after paying the trust creditors, would have belonged to such judgment creditor. So that the first doubt suggested in the garnishment, seems to be answered by the act of 1812, ch. 14, making trust property, real and personal, liable to execution. The other suggestion admits of the same answer. The real property is converted into personal, in virtue of a prior equity, only so far as the trust creditors had a lien upon the property. To the extent of their debts the equity was prior; but when that object was accomplished, there was but one equity remaining, and that was in Jones, whose right to the money, had it been received, was of that kind, which, it has been shewn, a Court of Law would have enforced.

Considering, then, the general scope and spirit of the attachment law, the property which it renders liable to the process, "estate and effects," and how easy it would be for an absconding debtor to evade its provisions, by suffering his property to be sold under a trust deed, for negotiable (259) securities, the Court are of opinion, that judgment should be rendered for the Plaintiffs on the garnishments of Mr. Browne and Mr. Cannon;* more especially as all the parties concerned are before the Court, and the drawer of the notes declares, in his garnishment, his willingness to pay the money.

This view of the case is taken from the garnishments alone: but from the parties concerned in this transaction, it is fair to presume, not only that the deed of trust was drawn in the usual, but in the best form. That form is, to insert a covenant upon the part of the trustee, to restore to the *cestui que trust* the surplus remaining after the payment of debts; in which case Jones would have had an indisputable legal remedy.

*NOTE.—R. Cannon was also summoned as a garnishee in this case, and in his garnishment declared his willingness to pay the money on the notes.

(260)

Den on demise of HATTAN & WIFE *et al.* *v.* ARTHUR DEW.

From Edgecombe.

An execution issued from February term 1807, on a judgment recovered in the County Court, and was returnable to May term following. The execution was continued, and by virtue of the one which issued from May term, 1808, the same being on the 9th May, and made returnable to August term following, the land in dispute was levied on and sold, and the lessor of the Plaintiff became the purchaser. Judgment was recovered against the same Defendant before a Justice of the Peace, and the execution which issued thereon was levied by a Constable *prior* to the levy made of the first execution by the Sheriff. The order of sale was made by County Court at August term, 1809. A *venditioni exponas* was issued, by virtue of which the land was sold, and the Defendant became the purchaser. The deed to the lessor of the Plaintiff recited that the sale, under which he claimed, was made by virtue of the execution which issued from February term of the County Court 1807; whereas in truth, it was not made until 27th July 1808. The Plaintiff is entitled to recover the lands: for,

1. The lien created by the teste of the execution, which issued on the 9th May 1808, was not destroyed by the levy afterwards made by the constable; particularly as there was no sale under that levy until a levy and sale under the first execution.
2. The erroneous recital in the deed to the lessor of the Plaintiff, does not affect the operation of the deed. The recital is not an essential part of the deed; its use is only to explain more fully the intention of the parties, or to serve as a reference in the future investigation of the title. It affirms no fact, and can never amount to an estoppel.

The execution gave the Sheriff authority to sell, and although his power be incorrectly set forth in the deed, yet the deed is good.

And it would seem that the Sheriff may be admitted a witness to prove the mistake, that he sold under the execution of 1808, and not under that of February 1807.

This case was sent up to this Court upon the following special verdict, to-wit:

"A judgment was obtained against Hattan, in Nash County Court, at February Sessions, 1807. Execution issued thereon, and was returned to May, 1807, without any levy having been made. A second issued, tested May, and returnable to August term, 1807, on which was a return, "Rec'd Clerk's and Sheriff's fees"—And the execution directed to the Sheriff of Edgecombe, tested the second Monday of May, 1808, and returnable on the second Monday in August following was issued, (261) and returned with the following indorsement, "Rec'd 40s. in part of this judgment, by sale of land; no more property to be found in my County"—The Sheriff levied the last mentioned execution on the 8th or 9th of June, 1808, and sold by virtue of it on the 27th July following, the land in question, when Coleman, one of the lessors of the Plaintiff, became the purchaser, and the Sheriff executed to him a deed. But the deed recites that a sale was made by virtue of an execution issued from Nash County Court, tested the second Monday of February, 1807. Hattan acquired his interest in the land by marrying his wife, and his marriage took place between the time of the judgment rendered, and the issuing of the execution on the second Monday of May, 1808. This is the title set up by the lessors of the Plaintiff.

"As to the title set up by the Defendant, the Jury find, that on the 13th day of May, 1808, a judgment was obtained, and execution issued thereon, against the goods and chattels, lands and tenements, of Hattan. A Constable, to whom it was directed, levied it eight or ten days before the sitting of Edgecombe County Court, and returned it to that Court. It was entered on the appearance docket, at August term, 1808, and continued until August term, 1809, when an order of sale was made, and an execution tested the fourth Monday of August, 1809, and returnable to November term following, was issued, under which the land was sold, and the Defendant became the purchaser. The defendant is in possession; and if, upon this finding, the law be in favor of the lessors of the Plaintiff, the Jury find the Defendant guilty, and assess his damages to sixpence and costs: If the law be for the Defendant, they find him not guilty."

Upon the trial, the Sheriff was admitted as a witness, to prove that he levied the execution which issued on the second Monday of May, 1808, on the 8th or 9th of June following, and sold the land in question, by virtue of that execution, on the 27th July. And upon his evidence, the Jury found these facts, as stated in the special verdict.

Upon this case, the Court were divided in opinion. Chief Justice Taylor and Judge Henderson being of opinion, that judgment should be rendered for the Plaintiff: and Judge Hall being of opinion, that judgment should be rendered for the defendant.

TAYLOR, Chief Justice.—The first execution against Hattan issued from February term, 1807, of Nash County Court, where the judgment was rendered: but the levy was made on the third execution, which bore teste the second (262) Monday in May, 1808, and the Jury have found, upon the evidence of the Sheriff, that the levy was actually made on the 8th or 9th of June following. The Sheriff's deed, however, recites that the sale was made by virtue of the first execution; and as this recital is erroneous, the question is, Whether the deed shall operate to convey the land to the purchaser, Coleman? If a recital were an essential part of a deed, or if the land were conveyed according to the recital thus erroneously stating the levy, there would be some ground for the objection to rest upon. But the use of it is only to explain more fully the intention of the parties, or to serve as a reference in the future investigation of the title. It affirms no fact, and never amounts to an estoppel. Coke Lit. 352, b. Finch. Law. 33.

If one recite a former lease to have been made on such a day to J S, and then make a new lease, to begin after the end of the former lease, and mistake the date of the old lease, in this case, the deed is good, notwithstanding the mistake. Dyer 93, 160. If, indeed, the property be described in the effective words of the conveyance, only according to the false description given of it in the recital, it will pass by the deed, as appears by the following case. If I grant to J S, all the lands *in Dale* which I purchased from J D, or which came to me by descent from J D; or, I give all my goods to J S, which I have as executor of J D, and, in truth, I have no such lands or goods, but I had them by some other means, or of some other person, in these cases, and by this mistake, the deed is void. But if I grant to J S, all my lands *in Dale* by name, as White acre, which I purchased of J D, and in truth, I purchased them of another, in this case, this mistake will not hurt the deed. Dyer 50, 87, 376. As, then, it appears in this case, that the Sheriff was duly authorised to make the sale, although his power is incorrectly set forth in the deed, a majority of the Court are of opinion, the (263) law arising on the special verdict is in favor of the Plaintiff.

HALL, Judge.—The lien created by the teste of the writ of execution, which issued on the 9th of May, 1808, cannot be destroyed by the levy afterwards made by the Constable, particularly as there was no sale under that levy until a levy and sale under the execution which first issued. In England, it is said, that if the Sheriff execute the writ last delivered to him, before the first, he shall be answerable himself for the debt due to the Plaintiff in the first execution. And of this he has no right to complain; because, as all executions are delivered to him, he may know which to execute first: But in this State it is otherwise. The Sheriff and Constables of a County, have each a right, in many cases, to levy and sell the same property; and it would not do to say, that one officer, executing a younger execution before an elder, in the hands of another officer, whether he knew of it or not, should be liable to the Plaintiff in the first. Whether purchasers under the younger execution would be protected, or whether the lien created from the teste of the first would subject property so sold, it is not necessary to decide; because the property was here first sold under the execution that first issued. It is said, that the reason of altering the law in England by the statute of frauds, in making the lien commenced from the delivery, and not from the teste of the writ, was on account of purchasers claiming property *bona fide* purchased under younger executions, when there were older ones, the lien whereof reached back to their teste. 1 Term Rep. 731. If this were the case, and the law has not been altered with us, it would seem that such purchasers would be obliged to yield to such lien, particularly when the two executions are in the hands of different officers, as in this case, and no remedy can be had against them. As to the first part of the case, my opinion is in favor of the Plaintiff.

As to the other question, my opinion differs from (264) that of my brethren, and I will briefly assign the reasons which support my opinion. It is enacted by the 27. Hen. 8, ch. 16, sec. 1, "that no lands or hereditaments shall pass, whereby any estate of inheritance or freehold shall be made, by reason of any bargain and sale, except the bargain and sale be made by writing and enrolled." It is also enacted by our act of 1715, ch. 38, sec. 5, that no conveyance of lands shall be good and available in law, unless the same be acknowledged or proved, and registered; and that all deeds so done and executed shall be valid and pass estates in lands, &c. Here it appears that lands cannot pass from one person to another without writing; and it is expected that every one can shew a written title to land of which he is the proprietor. It is true, that the Legislature have taken away the remedy of claimants, where they have not asserted their claims within the time prescribed by law, and vested the title in those who during that time have been in quiet possession. But these acts do not interfere with the requisite, that titles to land must be in writing; and where there is no possession relied upon, there must be no chasm in those titles; there must be no link wanting.—Now the Plaintiff does not depend upon possession for a title. Does he shew a written one? He shews a deed from the Sheriff, in which the Sheriff sets forth the authority he had for executing it, to-wit, an execution bearing date the second Monday of February, 1807. Were that execution shewn, and the judgment on which it issued, the Plaintiff's title would rest as far as it could upon written evidence. But it is admitted that the land was not sold under that execution; yet parol testimony is admitted to shew that it was sold under another execution. This is not only connecting the deed and execution by parol testimony, but expressly contradicting the very deed under which the Plaintiff claims, and to which he is a party. If this be allowable, who can find out in whom title to land is, by searching records? It (265) is true it appears, from the testimony adduced, that the land was sold under another execution issuing from the same judgment. But if that can be shewn, why not go a step further, and shew that it was sold under an execution issuing from another judgment between different parties? Would not this give rise to much confusion and inconvenience? Were this allowable, titles to land would in a great measure depend upon parol testimony. Is there any necessity for this? Would it not be an easy thing truly to recite the execution under which the land was sold? I doubt not, it was done in the present instance through mistake; this may be the case again; but that is no reason for adopting a rule that would give rise to so much uncertainty and inconvenience.

JOHN MOSELY WALKER, SARAH JANE WALKER and ELIZA H. WALKER, infants, by their next friend, CARLETON WALKER, *v.* HANSON KELLY, WILLIAM WATTS JONES and JOHN D. TOOMER, Executors of the last will of JOHN WALKER, deceased.

From New-Hanover.

Testator bequeaths *ten negroes* to A, *seven negroes* to B, and *seven* to C. After making his will, he sold all his negroes, and died possessed of a large estate. The legatees apply to the Court of Equity to order the executors to lay out so much of the estate as may be necessary to purchase negroes to make good the legacies. The Court will order the executors to make good the legacies.

Pending the suit, a compromise is made between the executors and the next friend of the legatees (who are minors) relative to the negroes, in which it is agreed that the value of the negroes, as found by the master, shall be paid to the guardian of the legatees. This compromise being satisfactory to the Court, is confirmed.

The bill charged, that John Walker, late of the county of New-Hanover, departed this life some time in the year 1813, having made and published his last will, of which (266) he appointed Hanson Kelly, William Watts Jones and John D. Toomer, executors, who proved the will in the Court of Pleas and Quarter Sessions for New Hanover county, and undertook the burthen of executing the same; that the testator bequeathed to the Complainant, John M. Walker, ten negroes and fourteen shares in the capital stock of the Bank of Cape Fear; to the Complainant, Sarah Jane Walker, seven negroes and fourteen shares of stock in said Bank; and to the Complainant, Eliza H. Walker, seven negroes and twenty-one shares of stock in the said Bank; that the Complainants had requested the Defendants to deliver over the legacies to their guardian, and the Defendants had refused to do so, without the direction of the Court, saying that the testator, after making his will, had disposed of all his negroes, and they did not think themselves safe in laying out the monies belonging to the estate in the purchase of other negroes for the Complainants, until the sum so to be laid out should be designated by the Court. The bill prayed for such relief as the Court might think the Complainants entitled to.

The answer of the Defendants admitted the facts as charged in the bill, and submitted to such decree as the Court might make in the premises. An account of the value of the negroes bequeathed to Complainants, and an account of the dividends which had accrued and been declared upon the bank stock, were taken by the Master; and the case was sent to this Court for a final decree.

BY THE COURT.—This cause coming on to be heard, the substance of the Complainants' bill appeared to be, that John Walker died some time in the year 1813, having made a last will and testament, of which he appointed the Defendants executors, who proved the will, and took upon themselves the burthen of the execution thereof. That by the said will he bequeathed to the Complainant, John M. Walker, ten negroes and fourteen shares in the capital stock (267) of the Bank of Cape Fear; to the Complainant, Sarah Jane Walker, seven negroes and fourteen shares in the capital stock of the Bank of Cape Fear; and to the Complainant, Eliza Henrietta Walker, seven negroes and twenty-one shares in the capital stock of the Bank of Cape-Fear: and the scope of the Complainants' bill is, that the sum to be expended by the executors aforesaid in the purchase of negroes to fulfil the aforesaid legacies, shall be ascertained by the Court, and that the Complainants may be relieved. Whereto the Defendants, by their answer, say, that they admit they were appointed executors of the last will of the said John Walker, and qualified as such, and that the legacies bequeathed thereby to the Complainants are truly set forth by their bill. That the said John Walker, after making his said will, sold and conveyed all the negroes he owned. That by the said will, they were directed to retain the said legacies until the *County Court* should appoint a guardian to Complainants, and take a bond with security for the performance of the trust; and they submit to the Court whether it were not the intention of the testator that the guardian should be appointed by the County Court of New-Hanover, and whether the Complainants be entitled to any, and, if any, to what sum of money in lieu of the negroes aforesaid: and the report of the Clerk and Master in Equity for the county of New Hanover being read, by which it appears that the negroes bequeathed to the Complainants were at the time of the death of the testator of the value of 7,920 dollars; and that on the 6th day of April, 1818, they were of the value of 10,692 dollars; and that, from the death of the testator to the 6th day of April aforesaid, the bank stock bequeathed to the Complainants, had produced in dividends and bonus the sum of 2,107 dollars.

The Court do order, adjudge and decree, that upon the performance by Carleton Walker, Esquire, (who, it appears to the satisfaction of the Court, hath been appointed guardian to the Complainants by the Court of Pleas and Quarter Sessions for the county of Cumberland,) of the matters (268) hereinafter required of him to be performed, the Defendants do transfer to the Complainants, John M. Walker and Sarah Jane Walker, each fourteen shares in the capital stock of the Bank of Cape Fear, and to the complainant Eliza Henrietta Walker, twenty-one shares in the capital stock of the said Bank: and do pay over to the guardian for the benefit of the complainants, the aforesaid sum of 2,107 dollars, being the dividends and bonus which have been declared and have accrued on the aforesaid stock up to the date of the Master's report; which sum will belong to the complainants in the following proportions, to-wit, to John M. Walker fourteen forty-ninth parts thereof, to Sarah Jane Walker, fourteen forty-ninth parts, and to Eliza Henrietta Walker twenty-one forty-ninth parts: and that the Defendants account with the said guardian for the dividends accrued on the said bank stock since the date of the Master's report aforesaid, and pay the same over to the said guardian, to be by him laid out for the benefit of the complainants, according to the same proportions.

And it further appearing to the satisfaction of the Court, that a compromise hath been made between the complainants, acting by their father and next friend, the aforesaid Carleton Walker, and the Defendants, relative to the legacies of negroes bequeathed to the complainants, which compromise appears to the Court to be reasonable, the Court do therefore, according to the terms of the said compromise, further order, adjudge and decree, that upon the performance by the said Carleton Walker of the requisitions aforesaid, and upon the assent of John Walker, the residuary legatee, being signified in writing and filed in the office of the Clerk and

Master of the County of New Hanover, or without such assent, at the election of the Defendants, they do further pay over to the said Guardian, for the benefit of the complainants, in satisfaction of the legacies of negroes bequeathed to them respectively, the sum of nine thousand dollars, to be divided among the complainants in the following proportions, (269) to-wit, to John M. Walker, ten twenty-fourth parts thereof, and to Sarah Jane Walker and Eliza Henrietta Walker each, seven twenty-fourth parts thereof.

And it appearing to the Court, that the penalty of the bond entered into by the said Carleton Walker, as guardian to the complainants, is not more than sufficient for the security of John M. Walker, it is further ordered, that no transfer of the aforesaid stock or payment of the aforesaid sums of money belonging to Sarah Jane Walker, or Eliza Henrietta Walker, be made to their said guardian, before he shall have entered into two other bonds, each in the sum of ten thousand dollars, with such security as may be approved by the Court of Pleas and Quarter Sessions for the County of Cumberland, conditioned for the proper discharge of his office of guardian.

(270)

JOHN H. HOWARD *v.* EDWARD PASTEUR AND JONATHAN PRICE.

From Craven.

The Defendant being arrested on a *ca. sa.* and in custody of the Sheriff, executed to the Sheriff a bond, with two sureties thereto, conditioned for his keeping within the rules of the prison, until he should be legally discharged therefrom. Whilst he was thus within the rules of the prison, a *capias ad respondendum* was issued against him, and he was thereon arrested and put into close jail. He thereupon notified the Plaintiffs in each case, of his intention to take the oath of insolvency, and the benefit of the act for the relief of insolvent debtors. On the day appointed, he took the oath, was discharged by the Judge, and went at large out of the limits of the rules of the prison. Motion for judgment against the sureties in the bond for his keeping within the rules of the prison, disallowed; for

His going out of the limits of the rules, after he was discharged as an insolvent debtor, was lawful, although he was in *close* jail at the instance of another creditor. The order of liberation extends to discharge him from all imprisonment for debt,

The act of 1773, recognizes two kinds of imprisonment, the one, *close jail*, the other, the rules of the prison, as directed by the act of 1741. The word *close* used in this act refers to the personal situation of the applicant, as a pre-requisite for taking the oath; but is omitted in that part which directs his discharge; and pre-supposes there may be others, who hold him in confinement, by directing them to be notified.

The Plaintiff obtained a judgment against Minor Huntington, at September term, 1815, of Craven County Court, for 70*l.* 4*s* 10*d.* and costs: whereon a *ca. sa.* duly issued, and was executed on the Defendant on the 25th of September, 1815. The Defendant being then in custody on the said *ca. sa.* on the day and year aforesaid, executed to the Sheriff, in proper form, a bond, with the present Defendants, Edward Pasteur and Jonathan Price, sureties thereto, conditioned for the said Huntington keeping within the rules of the prison, until he should be duly and legally discharged therefrom. On the first of September, 1817, a writ of *capias ad respondendum,* at the instance of Thomas M'Clin, and returnable to Craven County Court, was executed on the said Huntington; who was on that day, put into the walls of the prison, and there remained in close confinement, until the 13th of October following. While the Defendant was thus within (271) the walls of the prison, he duly notified M'Lin, and also the present Plaintiff, of his intention to take the benefit of the act for the relief of insolvent debtors; and on the said 13th October, 1817, before his honor Judge Daniel, took the ordinary oath of insolvency, and was ordered to be discharged from imprisonment.

After these proceedings, and before the notice of the present motion, Huntington voluntarily went beyond the limits of the rules of the prison; and the plaintiff thereupon moved for execution against his said sureties, the present Defendants. Their bond had been duly assigned to the Plaintiff by the Sheriff. On this case, the Court below adjudged, that an execution should issue, as prayed for by the Plaintiff; from which judgment the defendants appealed.

HENDERSON, Judge, delivered the opinion of the Court:

This case depends on the operation of the words "*shall be immediately set at liberty,*" in the first section of the act of 1773: that is, whether where a debtor is confined in close jail under one process, and has taken the bounds under another, such order of liberation, as has been made in this case, extends to discharge him from the bounds of the prison. And it is argued that it does not, because a prisoner of the latter description is not entitled to the benefit of that section of the act, for that section extends to those only who are in close jail. It does not follow that because none but a close prisoner can be permitted to take the oath of insolvency, that the liberation should extend to such only. It extends *to al* *imprisonment for debt.* None but close prisoners can take the oath; for the close confinement is required as a teste of the truth of the oath, and perhaps as a judgment for the imprudence of going in debt, beyond the liability to pay. Yet, when it is undergone, at the instance of any one, all those who have evidenced a like disposition to coerce payment by imprisonment, are alike affected. The words of the act, as well as its spirit, seem to require this construction. The Sheriff, when he produces the body of the debtor, is required to produce a list of the process, &c. by which he holds (272) him in confinement. He is to be set at liberty, not only from close imprisonment, but generally; that is, as we consider it, from all imprisonment for debt. And the third section, by using the words "in prison," omitting the word "close," shews that the Legislature recognized two kinds of imprisonment, the one close jail, that is, the walls of the jail, and the other, the rules of the prison, as directed by the act of 1741: which word "close," refers personally to the situation of the applicant, as a pre-requisite for taking the oath; but is omitted in that part which directs his discharge; and pre-supposes that there may be others who hold him in confinement, by directing them to be notified. Besides, what can this creditor complain of? If close jail be required as a teste and punishment, it has already been undergone in the same manner, and for the same time, that it would have been undergone, if the bounds, as to him, had not been taken. He has the same opportunity of offering opposing evidence, and of cross-examination; for he is to be notified. And we cannot perceive that his situation is in any way different as to the coercive powers of imprisonment, than if the debtor had remained in close jail. For the same thing is effected by another creditor in the same jail, and during the same period of time. If the Defendant be discharged in law from the imprisonment in this case, the bond which was taken to secure the creditor against an escape, is also discharged. For the law directs its officer, at the instance of the creditor, to confine the debtor; and the law directs its officer to discharge him. Of course, all means taken to that end, to-wit, the confinement, must cease, when that end ceases to exist. But we cannot distinguish this case from that of Burton and Dickens, decided at this term: For that which will prevent an arrest, will justify a discharge; and the debtor who takes the 40s. oath, stands in the same situation as to the bill of rights, with the debtor who surrenders up his property under the third section of the act of 1773. Let judgment be entered for the Defendants.

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(273) JOSHUA BELL *v.* NOAH BEEMEN and others.

From Edgecombe.

A, being in want of money, borrowed 200 dollars from B, and to secure the re-payment thereof, placed in the hands of B a negro slave, upon a parol agreement, that upon the re-payment of the money the negro should be re-delivered. B sold the negro to C, who took possession and held the negro for nine years. A filed his bill against B and C to redeem the negro. C pleaded that he was a purchaser for a valuable consideration without notice; and in his answer relied upon the length of time he had had the negro in his possession. His plea was found by the Jury to be true. Bill dismissed as to C; for,

1. His plea shall avail him.
2. His long adverse possession shall also avail him. Equity will not take from him any defence or protection, which would avail him at law. Here, his adverse possession for more than three years, is a good defence at law, under the plea of the statute of limitations.

And it is no answer to this objection, that the Defendant has not pleaded the statute. It is only in those cases where Courts of Equity and Courts of Law exercise concurrent jurisdiction, that, in this Court, the statute can be relied on as a positive bar, for equity follows the law, and the rights of the parties shall be the same in both Courts.

Where this Court has exclusive jurisdiction, equity will *respect time*, and frequently decides in analogy to the statute of limitations. In this case, the Defendant has exposed his situation, and the Court perceives that he has a good defence at law, which he may use with a safe conscience, and will not therefore interfere.

This was a bill brought to redeem a negro slave. The bill charged that Frederick Bell, father of the Complainant, being in want of money in the year 1801, obtained two hundred dollars on loan from Thomas Goff, and to secure the re-payment thereof, placed in the hands of Goff a negro slave named Peter, upon a parol agreement, that upon re-payment of the sum borrowed, the said negro should be returned to Bell, and that until that time Goff should keep him and have the benefit of his labor in lieu of interest. That in 1803, Bell died, having made and published his last will, which was duly admitted to probate in Edgecombe County Court, and Sally Bell one of the Defendants, qualified as Executrix thereof. (274) That the testator bequeathed the negro slave Peter to the Complainant, upon condition that he would redeem him. That soon after the death of Frederick Bell, Complainant tendered to Goff the sum borrowed, when he was informed by Goff that he had sold the negro to Noah Beeman, who, at the time of the purchase, was told by him, that he held the negro in pledge for the sum aforesaid. That Goff requested the Complainant to pay him the money, promising to procure the negro within a short time; that Complainant refused to pay until the negro should be delivered, whereupon Goff promised that he would in a short time procure him and bring him to Complainant. That partly from a hope that Goff would keep his promise, and partly from the straitness of his circumstances, Complainant had forborne to take any steps to coerce the delivery of the negro: That the yearly value of the negro's labour was worth much more than the interest of the money. The bill prayed process against Sally Bell, the Executrix, and against Goff and Beeman; that Goff and Beeman might submit to an account, and that Beeman be decreed to deliver up the negro.

The bill was taken *pro confesso*, and set down to be heard *ex parte* as against them.

Beeman put in a plea and answer. As to so much of the bill as sought a discovery from him of the manner in which Goff became possessed of or entitled to the negro, and as to his being pledged by bill to Goff for the re-payment of two hundred dollars, and as to the tender made to Goff, and his promise to return the negro, the annual hire and value of the negro, he pleaded, that on the nineteenth day of February, A. D. 1803, Goff being in possession of the negro, and claiming him as his own, he, Beeman, purchased said negro from Goff for the sum of two hundred and thirty dollars, which he then paid to Goff, who delivered the negro to him, and made to him a bill of sale, which he was ready to (275) produce when required. And that at the time he so purchased and paid for the said negro, he had no notice of Complainant's claim, nor of any claim to the negro other than that of Goff's. All which matters he averred and pleaded in bar of Complainant's bill, and craved judgment, of the Court, whether, &c.

As to so much of the bill as he did not plead to, he answered, that he purchased the negro of Goff on the 19th day of February, A. D. 1803, for the sum of two hundred and thirty dollars, which he paid to Goff, and took from him a bill of sale; and that he had been in quiet possession of the negro from that time up to the filing of the bill. That when he so purchased and paid for the negro, he had no notice that Complainant or any other person had any claim to him; that the negro was about eight years old when he purchased him, and at the time of putting in his answer, about twenty-one.

The bill was filed in 1818. And the parties having taken testimony, and the cause being set for hearing, certain issues were submitted to a Jury; who found "that the testator did, about the year 1802, pledge the negro slave in question to the Defendant, Goff, until he, Goff, should repay the sum of two hundred dollars then borrowed, and that the testator died on the 17th February, 1803. That on the 19th February, 1803, Goff sold the said negro to the Defendant, Beeman, who then had no notice of the pledge by the testator to Goff; and that the Defendant, Beeman, had been in uninterrupted possession from the time of the purchase, without demand, until January, 1816, when the Complainant tendered four hundred and ninety dollars in bank bills, and demanded the slave, which was refused to be delivered up. They further found, that in 1806, Complainant tendered to Goff two hundred dollars and interest, and demanded the negro from Goff."

Mordecai, for Complainant.—The Defendant, Beeman, rests his defence upon two grounds. 1st. That he is a purchaser for a valuable consideration without notice. 2d. The (276) length of time that intervened between his purchase and the Complainant's offer to redeem. To render the first ground available, it is necessary that Beeman should have the legal estate. His plea is founded upon the idea, that he has the same equity as the Complainant, and besides that, has the legal estate; and that when the equity is equal, the law shall prevail. In this case, Beeman had not the legal estate; that still remained in Goff, for by the contract between Bell and Goff, the latter acquired only a special property in the negro pledged. Ld. Ray. 917. A pledge is different from a mortgage. The latter is a contract by which the entire property is transferred to the mortgagee, defeasible by the performance of a condition. After the day fixed for the performance is passed, the property becomes, by the contract, absolutely vested in the mortgagee. The former is a delivery, of property, to be restored on the payment of a certain sum, and never becomes the absolute property of the pawnee.

Cro. Jac. 244. Noy 137. 2 Ves. jun. 378. The legal estate was in Frederick Bell; Goff had only a special interest, and if it were transferable, (which is questionable) his assignee acquired his title and no more. 1 Bac. 372, 5 Term 604, 2 Term 376. Therefore Beeman, not having the legal estate, his plea cannot avail him.

As to the second ground, the statute of limitations could not operate, as there was no time fixed for the redemption of the pledge. For the possession of the pawnee was not adverse, but according to the terms of the original contract, until the demand was made just before the filing of the bill. 1 Ves. 278. Time operates in two ways in a Court of Equity; first as a positive bar; secondly as a circumstance which will induce a Court of Equity to refuse its interference. In cases between *cestui que trust* and his trustee, the statute does not operate; it cannot therefore be pleaded. But length of time may operate to induce a Court to refuse its aid. Between *cestui que trust* and a stranger, the statute does operate (277) (1 John Ch. Rep. 316. 1 Bro. Ch. Rep. 552); and where it can operate as a positive bar, the statute should be pleaded or insisted upon in the answer. Here there was no trust between the Complainant and Beeman; the lapse of time should therefore have been insisted upon as a positive bar. But if in cases where there is no trust, the length of time may be met, either as a positive bar, or as a circumstance to induce a Court to refuse its interference; the time in this case is too short. It can only refuse its interference upon a presumption of satisfaction. That presumption cannot arise sooner in the case of a pledge or a mortgage than upon a bond.

HENDERSON, Judge delivered the opinion of the Court:

The Defendant Beeman claims the protection of the Court of Equity, because he says that he is the purchaser of the slave in question, *bona fide*, for a valuable consideration, and without notice of the Complainant's title; and that he has had the continued possession thereof for upwards of nine years; and these facts are found by the Jury. A purchaser for a valuable consideration, without notice, is not to be dealt with in equity otherwise than at law; for where the equity is equal, the law shall prevail, and none can have a higher equity than such a purchaser, therefore this Court will not take from him any defence, shield or protection, which would avail him at law. Here his adverse possession for more than three years, is a good defence at law, under the plea of the statute of limitations. But it is said he has not pleaded the statute in this Court, and has therefore waived that defence. The statute cannot be pleaded in this case; but he pleads that he is a purchaser, and shews how at law he is protected, and prays that this Court will not take from him his defence, or deal otherwise with him than a Court of law would. And if the Court can perceive that he has advantages at law, it will not interfere, but (278) leave the parties to the Courts of Law. But in fact, the Defendant in this case, could not, in a Court of Equity, plead the statute; that can only be done and relied on as a positive bar, where the question is also cognizable at law; that is, where the Courts have concurrent jurisdiction. For equity follows the law, and the rights of the parties shall be the same in both Courts. They shall not be changed by the Complainant's choosing his forum. Where this Court has exclusive jurisdiction, equity will *respect time*, and frequently decides in analogy to the statute of limitations. But then the statute is not pleaded as a positive bar. The Defendant has done this in the present case: he exposes his situation, and the Court perceives that he has a good defence at law, which he may use with a safe conscience, and will not therefore interfere. Let the bill be dismissed: but without costs, except those incurred since the finding of the issue in the Defendant's favor.

(279) ABRAHAM S. HALLETT *v.* FRANCIS LAMOTHE.

From Craven.

Question of jurisdiction.—The Plaintiff was owner of the brig *Jane* and her cargo, both of which were covered by *Spanish* papers to protect them from *British* capture, during the late war between Great-Britain and the United States. On her voyage from a *Spanish* to an *American* port, she was captured by an armed schooner in a belligerent manner, and a prize-master and crew put on board; by whom she was brought into the port of Beaufort, North-Carolina, where she was entered as a Spanish merchantman, having all the papers which it is usual for such a vessel to possess. No commission was shewn by the schooner at the time of the capture; but it was known that she had been fitted out from a port of the *United States*, whence she sailed as a cruiser under a *Carthegenian* commission.—Upon the arrival of the *Jane* at Beaufort, she was consigned by the prize-master to the Defendant, who sold part of the cargo, and loaded her with a return cargo. Before she sailed, the American captain appeared and libelled the brig and cargo in the United States' District Court of Admiralty. The brig was restored, the return cargo directed to be sold, and its proceeds, after payment of costs, paid to the Plaintiff for damages for the detention. But as to the prayer in the libel, that damages should be decreed for the value of the cargo on board at the time of the capture, and that the Defendant and others should account for the value in their hands, the libellant waived all further claim on that process, and no decree was made thereon; he then brought an action of trover to recover the value of so much of the cargo, as had been sold by the Defendant—The action will not lie; for

The Courts of common law have no jurisdiction in this case, the question of prize or no prize, is exclusively of admiralty cognizance; and that question must be decided before it can be ascertained whether the Defendant has committed a wrongful conversión.

The jurisdiction of a common law Court administering a code not common to other nations, is ousted, whenever it appears that the capture was made in a hostile manner; and whenever the jurisdiction of the admiralty has once attached by the taking as prize, nothing subsequent can take it away.

Whether the State that granted the commission to the cruiser, could rightfully exercise the prerogatives of sovereignty, is a question to be determined by the laws of nations, and not by the municipal laws of any country.

The view of the case is the same, if the case be considered as one of piracy.

The objection that the Plaintiff would be without redress, if a common law Court refuse it, is answered by the decision of the Supreme Court of the United States, "that a prize Court of the (280) United States has cognizance of a capture as prize, where the property is brought within the jurisdiction of such Court; and if the capture were made without a commission, or the vessel illegally fitted out in the neutral country, the captors are bound to make restitution."

Action of trover and conversion—plea, not guilty. The Jury found the Defendant guilty of the trover and conversion charged in the Plaintiff's declaration, as to four thousand hides, and not guilty as to the residue therein charged; and assess the Plaintiff's damages to 4,040 dollars, subject to the opinion of the Court upon the question whether a Court of Common Law has jurisdiction of the matter in controversy. The question arose on the following case:

The Plaintiff, a resident and merchant of New-York, was the proprietor of the brig Jane and her cargo, bound on a voyage from Porto Cavallo to New-York. To protect the Jane and her cargo from British capture, during the late war, they were both covered by Spanish documents, and purported to belong to Spanish subjects resident at Porto Cavallo. On the high sea she was chased by an armed schooner; who captured her in a belligerent manner, putting on board a prize-master and a prize-crew. The schooner did not shew a commission; but it was known that she had recently sailed as an armed cruiser, under a Carthagenian commission, from a port of the United States, where she was repaired and fitted for the cruise. Not long after the capture, the Jane, newly painted and otherwise altered in appearance, arrived with her cargo at the port of Beaufort in North-Carolina, documented as a Spanish merchant ship coming from Cuba, commanded by a man calling himself Pedro Gonozales, and having all the papers which a *bona fide* Spanish merchant vessel would ordinarily possess. How these papers had been procured, did not appear. There was no evidence to shew that any condemnation had taken place, or to account for the apparent change of ownership. (281) Gonzales, on his arrival, consigned the brig to the Defendant, a merchant in North-Carolina, who as consignee in the ordinary mercantile mode, entered her at the custom-house, bonded the cargo, and sold the four thousand hides set forth in the verdict, for the price of $4,040 giving a bill of parcels in his own name.

After this sale and a payment of part of its proceeds in duties and charges, and after Gonzales had gone, the American captain of the Jane appeared, and made known her capture as aforesaid. A libel was filed, and admiralty process sued out in the name of the Plaintiff, in the United States District Court, after she was loaded with a return cargo : and on this process the brig was restored, the return cargo decreed to be sold, and its proceeds, after payment of costs, paid to Plaintiff for damages sustained by reason of detention. In the libel it was prayed that the Court would decree damages for the value of the cargo on board at the time of capture, and that the present Defendant and others should account for the proceeds of said cargo in their hands. While this claim was reserved for the decision of the Court, the libellant waived any further decree, and no decision was made upon it. This action was then instituted against the Defendant.

On the trial it was objected that this Court had not jurisdiction of the case, because it involved the question of prize or not prize.—The Court reserved this objection, and the verdict was rendered subject thereto. The case was sent to this Court, when it was argued by *Mordecai* for the Plaintiff, and *Gaston* for the Defendant.

Mordecai for the Plaintiff, in support of the jurisdiction.

The Plaintiff has been deprived of his property and is entitled to a remedy. The question submitted in this case is, has he applied to the proper forum?—It is said this Court has no jurisdiction. 1st. Because the case involves the question of prize or not prize, which is cognizable only (282) in the admiralty. 2d. That if it be not a question of prize, it is one of piracy, and cognizable only in the admiralty. 3d. That under the constitution and judiciary acts of the United States, this case can be tried only in the Admiralty.

It may be laid down as a general rule, that all possible injuries not within the *exclusive jurisdiction* of other Courts, are within the cognizance of the Common Law Courts; (3 Black. Com. 109) and it was said by Lord Holt, (1 Ld. Ray. 272) "the Common Law is the overruling jurisdiction, and you must entitle yourselves well to draw a thing out of the jurisdiction of it."—For a tortious taking at sea, unconnected with the question of prize or no prize, there is a concurrent jurisdiction in the Courts of Admiralty and Common Law; (3 Binney, 271. Id. 245) and in many other cases the Courts of Admiralty and the Courts of Common Law have concurrent jurisdiction; as salvage—charter party—seamen's wages, &c.—It is only in cases of prize, and in questions arising from taking as prize, that the Court of Admiralty has *exclusive* jurisdiction; and then the trial must be in the Court of the captor. See Sir Wm. Scott's answer to Mr. Jay, 1 Rob. Introduc. iv. 1 Wheaton 254, 261. 1 Johns. 481. 4 Cranch. 282. Id. 243, where no objection was taken to the common law remedy.

This is not a question of prize. The commission, if there be any, is not granted by a State of which we can judicially take notice. Our government has not yet recognized it as an independent state, and until such recognition, it must be regarded as a part of the colonial possessions of Spain. 4 Cranch. 272. 1 John. Ch. Rep. 547. 13 Johns. 155, 587. 9 Ves. 347. Edwd. Adm. Rep. 1. Case of the Manilla. Appendix D. Case of the Pelican. And as the question of prize or no prize, is triable only in the Court of the Sovereign of the captor, it follows that the commission must be granted by a known Sovereign State. 4 Cranch. 282. 1 Wheaten 254. Our Courts have a right to enquire whether this cruiser was lawfully commissioned. 3 Dallas 159. 1 Wheaton 258.

If it be said that this is an admiralty case, it is (283) clear that that Court sitting as a Prize Court has no jurisdiction; and viewing the case as a marine tort, Common Law Courts have current jurisdiction with the admiralty. 1 Robs. Rep. 38. What is a prize? It is defined to be something "taken on the high seas *Jure Belli*, out of the hands of an enemy." Judge Chase says, "that prize *ex vi termini* implies a capture in a state of war." 4 Dallas, 44. A seisure on the high seas by an unauthorised individual, is a mere trespass and produces no change of rights. 4 Cranch. 282.

This, then, is not a question of prize. The vessel was not taken by a cruiser commissioned by sovereign authority—she was not taken as a prize. There is no evidence that the cruiser had any commission, and the conduct of the captors shews that the vessel taken was not taken as a prize; for she was not carried in for condemnation—she was *entered*, under *forged* papers, as a Spanish vessel. Until condemnation as prize, the property is not changed (1 John. 481. 2 Bur. 694. 1 Rob. Rep. 117); and that condemnation must be in the Court of the captors, as a consequence of the equality and independence of sovereign states. Where could such condemnation take place in the present case?

There is another ground upon which this must be considered as a common marine tort: This vessel was fitted out in the United States in violation of our laws. See act of 5th June, 1794. 2 Rev. Code, 426. Continued by act 24th April, 1800. 3 Dallas, 153, 154, 155, 158, 168, 169. In this case in Dallas, Judge Patterson declared, that even if the captain of the cruiser had a French commission, it would be questionable, whether, as he left this country *mala fide*, the property taken should not be restored to the rightful owners. Courts will not afford aid to those who contravene these laws.

Then what claim to exemption have the Defendants? When and where did they acquire a character to render them independent of the tribunals of the country? Was (284) it whilst violating the law in fitting out at one of our ports? Was it whilst attacking the property of American merchants on the high seas? Or whilst stealing their prize into Beaufort? The true rule to be collected from all the authorities is, that the municipal Courts have jurisdiction in all cases, except where the act complained of has been committed by the commissioned agent of a sovereign state.

As soon as such commission appears, the Court of Common Law must stop, and the trial must be in the Prize Court of the captor.

2. But it is said, if this be not a case of prize, it is one of piracy, and cognizable only in the Admiralty. In answer to this objection it may be urged, that every tortious taking is not piracy. 3 Dallas, 154, 160. The plaintiff alleges that this was a mere conversion of his property, and that the Defendant cannot allege his own iniquity in his defence. 3 Dallas, 158. 1 Mod. 283. 6 Com. Dig. 397. By a practical taking, the right of the property is not altered: you may proceed criminally for the piracy, and civilly for the goods. 3 Dallas, 160. Cro. Eliz. 685. The trespass is not merged in the piracy, which is a civil law felony (3 Inst. 111, 112), in which there was no appeal. 4 Black. Com. 362, 363.

3. As to the objection arising under the Constitution and the acts establishing the judiciary of the United States, it is contended, that exclusive jurisdiction is not given to the Courts of the United States. The Constitution declares that "the judicial power of the United States shall extend to *all cases* of admiralty and maritime jurisdiction." The Constitution did not intend to give in these cases exclusive jurisdiction. It will be seen, by reference to that instrument, that wherever exclusive jurisdiction was intended to be given to any branch of the government, it has been done in express words. "The Senate shall have sole power to try all impeachments." Art. 1, sec. 3, clause 5. Where no such exclusive jurisdiction is intended to be given, a different (285) phraseology is used: "The judicial power shall extend to all questions arising under the Constitution; to controversies between citizens of different states," &c. And such questions are every day entertained in the State Courts.

This is not necessarily a maritime case. It is a mere trespass. Could not a suit for an assault and battery committed on the high seas, be prosecuted in the State Courts? The judicial act, 24th Sep. 1789, (sec. 2, Rev. Code, 60,) recognises the jurisdiction of the Common Law Courts, where they are competent to give relief; and this may be considered as a cotemporaneous exposition of the Constitution. See Breckenridge's opinion. 3 Binney, 263.

Gaston, for the Defendant, against the jurisdiction. The first section of the third article of the Constitution declares, that "the judical power of the United States shall extend to all cases of admiralty and maritime jurisdiction;" and the act of Congress of 24th Sep. 1789, gives to the District Courts of the United States exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving the common law remedy, where the common law gives one. To ascertain what are causes of admiralty and maritime jurisdiction, either *exclusively*, or concurrently with the common law, we must examine into the English doctrine on the subject.

The jurisdictions of all Courts in England are either mediately or immediately derived from the Crown. The administration of justice is one of the attributes of the Executive power, originally exercised in person, but for many ages back delegated to the Judges of the different Courts. These Courts have gained a known and stated jurisdiction, regulated by certain and established rules, which nothing short of the authority of Parliament can alter; but all flowing (286) from the same fountain. 1 Black. Com. 266, 7. 3 do. 24. These Courts are known to be principally four: 1st, The Courts of Common Law and Equity. 2d. The Courts Ecclesiastical. 3d. The Courts Military. 4th. The Courts Maritime. As the partition of jurisdiction between them was not very specifically defined, it must have happened that conflicts arose among them, and that the limits of their respective jurisdictions were not immediately ascertained.

We will turn our attention to the Courts of Common Law and the Courts Maritime. The business of the first was to enforce contracts made within the body of the realm; and so strictly was this the case, that it was an established maxim, that nothing done without the realm could be tried within it by the oaths of twelve men. Littleton, § 440. Doctor & Student, B. 2, ch. 2. The object of the latter was to inquire into maritime contracts and torts arising on the sea, or in parts out of the reach of the common law. It was a delegation of that branch of the executive prerogative and duty, which regarded the protection of the king's subjects by sea. 3 Black. Com. 69. 3 Reeves' History, 198. 13 Reports, 53. It was considered as comprehending all questions of prize, of torts and offences, as well in ports within the ebb and flow of the tide as on the high seas, of contracts of a maritime nature, or relating to navigation, and also the custody of the prerogative of the crown in the British seas. 2 Gal. 400 to 407.

This jurisdiction was gradually impaired. The barons and the boroughs which had a privilege of holding special Courts were anxious to take away from these Courts the jurisdiction of wrecks. They wished to enjoy the fortunate spoil thrown upon their shores, rather than suffer an over refined tribunal to preserve it for the distressed owners. They, therefore, procured the passage of the act of 13 Rich'd, 2, ch. 5, 15 Rich'd, 2, ch., 3, and 2 Hen. 4, ch. 11. Essay on the Civil Jurisdiction of the Admiralty. Introduction to (287) Hall's Translation of Clarke's Praxis. These statutes declared that the Admiralty should not take cognizance of any contracts, pleas or quarrels, or other things arising within the bodies of counties, as well by land as sea, nor (specially naming them) of wrecks of the sea; and they gave an action to the party who should be wrongfully pursued in an Admiralty Court.

In the conflict which afterwards occurred between the Courts of Common Law and the Maritime Courts, (similar to those of the Courts of Common Law with the Courts of Equity and with the Ecclesiastical Courts,) the former availed themselves of these statutes to effect that which never had been designed by them. They imposed a most rigid construction, and confined the admiralty jurisdiction (with some remarkable exceptions) to contracts and other things arising *exclusively*, and executed, or to be executed, exclusively on the high seas. 2 Gal. 406 to 422, and authorities there cited. No one was more zealous in this strife than Lord Coke, of whom Justice Buller remarked, "What is said by my Lord Coke in 4 Inst. 135, relative to the admiralty jurisdiction, has always been received with great caution and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against that jurisdiction." 3 Term Reports, 348. The Courts of Common Law enforced their construction by means of their writs of prohibition; and to prevent a failure of justice in this and other cases, they invented the fiction of supposing an act done on the seas, or beyond seas, as done within the realm, and permitted a false *venue* to be averred, which they would not suffer to be traversed; (Co. Litt. 261, b.) and thus rendered the controversy triable by an English jury.

In many instances, the Court of Admiralty were thus stripped of their jurisdiction, while in others they were permitted to exercise it in common with the Courts of Common Law. The latter were principally mariners' wages, (288) except where the contract was under seal; bottomry, in certain cases and under many restrictions; salvage, where the wrecked property was not cast on shore. Abbot, 528, 153, 4 and 5, 383 and 4; Introd. to Clarke's Praxis.

It must be remembered that every Court of Admiralty has two distinct functions: indeed, it may be said that the Judge holds two Admiralty Courts of civil jurisdiction, the one is the general Court of Admiralty or the *Instance* Court: the other the *Prize* Court. The first is holden by virtue of his general commission, enumerating every object of his judicial cognizance, but nothing relative to prize. To call forth this other authority, a distinct commission issues directing him to proceed upon all manner of capture, seisures, prizes and reprisals of all ships or goods, and to hear and determine thereof, according to the course of the admiralty and the law of nations.

The enactment of the Parliament and the efforts of the Judges of the Common Law Courts, had no view whatever to the prize jurisdiction of admiralty. The statutes did not refer to prize proceedings, there had been no complaints about such, no prohibitions in such; and the Prize Courts continued uniformly, and without interruption, to try all cases involving the question of capture as prize within or without the realm. Dorcey, 613 and 614, 2d Woodeson, 451, 2. Notwithstanding the favorite maxim of the day, "*Est boni judicis ampliare jurisdictionem*," an attempt was *scarcely* made to bring such a case within the reach of the Westminster Courts. It was a matter to be decided by the *jus gentium*, which they did not profess to understand, required an acquaintance with the King's foreign treaties, with the forms of foreign commissions, with the nature of the relative intercourse, friendly or hostile, between foreign states, and with the proceedings of foreign Courts acting under the civil law; all perfectly foreign from the subjects of municipal jurisprudence—sometimes they would be tempted to make an encroachment, but they did not long (289) persist. For instance, they at one time held that if a tort be committed at sea, fit for the consideration of a Maritime Court, and the property taken be afterwards changed on land, or if the tort were not a continuing one, but severed by the intervention of new parties, they could then claim a jurisdiction. *The Spanish Ambassador* v. *Jolliffe*, Hob. 78. But, on mature consideration, this claim was retracted, upon the very plain reason, that it would drive them to examine into the nature of the original tort, which they professed not to understand; and they laid it down as a fixed principle, that where the original tort was at sea, the jurisdiction of the Admiralty should not be defeated by any subsequent transaction on land. 1 Vent. 308, 173. 2 Saund. 259, Cro. Eliz. 685. 1 Roll. Ab. 530. Com. Dig. Adm'y F. 5 and 6. 2 Gall. 435 and 436.

This jurisdiction of prize, claimed and exercised by the Admiralty Courts exclusively, not only not prohibited to them, but never exercised, and in fact disclaimed by the Courts of Common law, comprehended,

1. Every case of capture, or of alleged capture, as prize by British subjects.[‡]

2. Every case of capture on the high seas by pirates, where the thing or persons came within the British realm.[§]

(290) 3. Every case of alleged capture as prize by foreigners, where the prize is brought within the realm.

The Court of Prize has there jurisdiction to examine whether it has been so taken, whether under authority, whether under circumstances demanding or justifying the interference of the nation; and this more especially, if any subjects of its own complain.

[‡] Radley *v.* Egglesfield. 2 Saunders, 259. Where, after an adjudication of prize, the Court of Admiralty still had jurisdiction to examine whether it was prize, and determine the validity of the sentence; for the validity of such sentence is not determined by the Common Law.

Turner and Carey *v.* Nile, 1 Lev. 243. Or Turner & Carey *v.* Smith, 1 Sid. 367, for damage sustained in port by reason of an illegal capture of a neutral by a British letter of marque. See Le Caux *v.* Eden, Dougl. 594, and cases there ctted.

[§] Cro. Eliz. 635. If goods be tortiously taken on the sea by piracy, and sold upon the land, not in market in overt, the matter shall be tried in the Admiralty. Ventris, 308. Ship taken by pirates and carried to Tunis and sold. Notwithstanding the sale on land, it is a case for the Admiralty—quoted 2 Bac. Ab.—*Court of Admiralty.*

Spark *v.* Stafford, Hard. 183. Ship taken at sea by pirates, and ransomed by master, who paid the money on land. Suit in the Admiralty for the money.

If the prize be carried in neutral territory, the Admiralty then shall enquire and may restore.*

If it be supposed that the Courts of Common Law (291) have a concurrent jurisdiction, this supposition is repelled,

1. By the utter want of precedent to shew that an action in such a case ever was sustained in a Court of Common Law. It was said by Justice Buller, "that an universal silence in Westminster Hall on a subject, which frequently gives occasion for litigation, is a strong argument to prove that no such action can be sustained."

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* 3 Dallas, 160. Lex. Merc. 206, 207, 227. Molloy, 41, B. 1, C. 2, § 21. Institutes of Admiralty, 7, 219.

A Dunkirker took a French vessel on the high seas, and sold ship and lading at Weymouth before carrying them *infra præsidia.* A fit case for the Admiralty. Laws of the Admiralty, 1 vol. 126.

Palaches case, 3 Buls. 27, 8 9. 1 Rolle's Rep. 175.

The *Perseverance*, 2 Rob. 198. A British vessel taken as prize, illegally condemned in Norway, seized by the former owner on her coming to England, through the medium of a Court of Prize.

The *Kierlighest*, 3. Rob. 82. British ship which had been taken as prize by the French, condemned by a French consul in Norway, sold to a Dane, captured again, condemned in Spain by a French consul, but ordered to be restored on appeal, comes into a British port. The Court of Admiralty there examines into the transaction, and restores.

Glass v. *sloop Betsey*, 3 Dallas, 6. An American Court of Admiralty has jurisdiction to entertain the libel of its own citizens, and friendly foreigners seeking the restitution of property taken from them as prize on the high seas, and brought into our ports. "That the vessel is a legal prize may be a good plea to the Court, but it is none to the jurisdiction of the Court.

Talbot v. *Janson*, 3 Dallas, 133. Prize Court in the United States has a right to examine into a capture made on the high seas as prize, and brought into a port of the United States. And if it appear that the capture were made *without commission*, or the vessel were illegally equipped in a neutral country, it is bound to restore.

The *Alerta*, 9 Cranch, 359. Same doctrine fully laid down by the Supreme Court.

The *L'Invincible*, 1 Wheaton, 257, 258. When a vessel is seized upon the high seas, it is *prima facie* a maritime tort, of which the Admiralty Courts of the country into which she is carried may inquire. It is no plea to the jurisdiction of such Courts that the seizure was as prize. Such Courts, proceeding by *jus jenitum*, may go on to examine whether it was an authorized seizure, made in the legitimate exercise of the rights of war. It appear to such a Court that there was no commission; that the seizure violated the territorial rights of the nation; that the capturing vessel was illegally equipped within the country; then it is bound to exercise its proper Admiralty powers, the power of protesting against unlawful depredations on the high seas, to restore and compensate. But the instant it is shewn to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights of war; their progress is arrested, and the case must be left to the Courts of Prize of the captors.

2. By the reason which permits the Court of Admiralty to take cognizance of such controversies. The question of "prize or no prize," is to be decided, not on principles of Municipal Law, but by the Law of Nations and by treaties. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a tribunal for the trial of prize. Every claimant resorts to this tribunal, which in all civilized nations is governed by the same law. The cases which are brought before it, almost uniformly affect the sovereign authority of other nations, and may change the public relations of the one in which the tribunal hears and decides them. They should, therefore, be confided to a national tribunal, and to none other. Judge Iredell's Remarks, 3 Dallas 91.

3. By the most express and repeated adjudications, that wherever a case presents the question of "Prize or not prize?" not only the Admiralty shall, but the Common Law Courts shall not have jurisdiction. It is emphatically the question which excludes jurisdiction. However wrongful the capture, however destitute of color, though there has been a (292) final decision that it was not prize, yet the existence of the question precludes the Common Law jurisdiction.*

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*Le Caux *v.* Eden, Dougl. 594. Smart *v.* Wolff, 3 Term Rep. 344. Camden *v.* Horne, 4 Term, 382. Key *v.* Hubbard, do. 607.

Doane's Administrator v. *Penhallow*, 1 Dallas, 218. There had been a final decree for restitution of property, because it was not prize. After this decree, the person having possession used the property. On an action being brought at Common Law, the suit was dismissed, because the original taking was a prize; and the question whether prize or not occurred again, although the sentence was decisive evidence to prove it was not prize. And it was held that Courts of Common Law and *Instance* Courts might have concurrent jurisdiction; but Courts of Common Law and Courts of *Prize, never.* A libel was afterwards filed in the District Court of the United States, as a Court of Prize. Jurisdiction entertained, and redress given. 3 Dallas, 54.

Ross' Executors v. *Rittenhouse*, 2 Dallas, 160 to 170. An action at Common Law to recover a sum of money which an Inferior Judge of a Court of Admiralty had been ordered to pay, will not lie. A libel for the money in the United States' District Court, as a Court of Prize, was maintained. See 5 Cranch.

Dusportas v. *Jennings & Woodrop*, 1 Bay's Reports, 470. A sale was made in the United States, under an order of a French Consul here, as of prize, and a purchase by the former proprietors, who refused to pay. An action could not be sustained, because of the question of prize or not prize, which deprived such a Court of jurisdiction.

Maidonnair v. *Keating*, 2 Gallison, 325. The cognizance of ransom

If it be objected that it does not appear that the capturing vessel had a commission; that if it had, the authority of that commission was invalidated by equipment within the United States, or the subsequent conduct of the captors; it may be answered, that the question is not *now* was it a good (293) prize?—did the capture vest the property? but a preliminary inquiry: Can this Court have cognizance of a cause which presents such a question?

If a capture be made as prize, under the pretence of a *jus belli*, it is not a fit subject for the jurisdiction of a Court of Common Law. But still a Court of Prize may examine into it. Should that Court find it was made with authority from any sovereign, or that it was an outrage on the rights of the nation where such Court is held, such Court may restore. (Glass *v.* the Betsey, Talbot *v.* Janson, the Alerta, &c. before cited.) But when it finds it to be done by authority of the sovereign of the captors, it remits the case to the decision of his Courts of Prize. This inquiry into the regularity of the commission and conduct of the captors is interdicted to a Municipal Court.

In opposition to all these principles and decisions, is brought forward the case of Wheelright *v.* Depreyster, from 1 John. 471. As to this case, it may be said, that the point was really never decided, but evaded by the Court. It was distinctly made by the Counsel, see 476. "This, being a question of prize, belongs properly to the District or Admiralty Court, and is not cognizable here. All questions relating to property sold as prize, and in which the legality of the capture is litigated, belong exclusively to the Admiralty Court." This argument is feebly answered by asking, "Is this the time to raise objections to jurisdiction on a motion for a new trial? Why did you not remove the cause into the Court of the United States?" In the judgment of the Court, this objection to the jurisdiction is absolutely mistaken

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bills exclusively belongs to the Admiralty, because they involve the question of prize or no prize, the legality of the capture, the regularity of the commission, and conduct of the captors.

Chariott v. *Tonpart*, 3 Binney, 220. A Court of Common Law cannot sustain an action to recover property which has been taken on the high seas as prize. Per Yates & Breckenridge, Judges.

And Courts of Common Law cannot have jurisdiction where Courts of Prize have. Per Washington, Judge, in Snell *v.* Foupart, 3 Binney, 239.

Simpson v. *Nadeau*, 2 Hay. 391. Conf. Rep. 115. If a capture be made on pretence of prize, it ousts the jurisdiction of a Court of Common Law.

for the position "that the sentence of the Court at St. Domingo was conclusive." They examine whether the sentence of condemnation at St. Domingo was conclusive, in order to ascertain whether they have a jurisdiction. The attempt to shew that in questions of insurance, Courts of Common Law exercise the jurisdiction which is there contested entirely fails. They do not inquire whether the capture be (294) as prize? Whether the captors have authority? Whether the property be changed? But, simply, what was its character when taken? Did it comport with that described in the policy?

The case of Hallett *v.* Novion, in 14 Johns. is also quoted. The decision is made by a bare majority, and the reasons given will not stand an examination. They are completely answered and refuted in the opinion of the minority, as delivered by Mr. Justice Spencer. By what logic is it established, that because the original equipment was against our municipal laws, that a capture made cannot be a prize of war? Suppose this to be established, will it follow that the capture could not even have been made as prize? If Congress pass a law prohibiting an act, and giving jurisdiction of the offence to the Federal Courts, have they therefore taken from those Courts the civil jurisdiction which they heretofore exclusively had over the consequences of such an act?

Originally maritime captures under the form of war were solely examinable in the Admiralty Courts, and, however wrongful, were not what the Common Law recognized as trespasses. By prohibitions and fictitious venues, the Courts of Common Law have indeed much restricted the jurisdiction of the instance side of the Admiralty Courts, but have never taken any part of their jurisdiction in matters of prize. All torts connected with asserted prize, have ever admitted and received in Courts of Admiralty complete redress; and their jurisdiction over such torts is rigorously exclusive. This exclusive jurisdiction, by a fundamental law of the land, has been wisely given to a national tribunal.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The question of jurisdiction arises out of the following facts: The Plaintiff was owner of the brig Jane and cargo, both of which were covered by *Spanish* papers to protect them from *British* capture. On her voyage from a (295) Spanish to an American port, she was captured by an armed schooner, in a belligerent manner, and a prize master and crew put on board of her, by whom she was conducted to the port of Beaufort, in this State, where she was entered as a Spanish merchantman, having all the papers which it is usual for such a vessel to possess. No commission was shewn by the schooner at the time of the capture; but it is known that she was fitted out from *a port in the United States*, whence she sailed on a cruise under a *Carthagenian* commission. Upon the arrival of the Jane at Beaufort, she was consigned by Gonzales, the prize master, to the Defendant, who sold part of the cargo, and loaded the brig with a return cargo, when the American captain appeared, and libelled the brig and cargo in the United States District Court of Admiralty. The brig was restored, the return cargo directed to be sold, and its proceeds, after payment of costs, paid to the plaintiff for damages; but as to the prayer in the libel, that damages should be decreed for the value of the cargo on board at the time of the capture, and that the Defendant should account for the value in his hands, the libellant waived all further claim on that process, and no decree was made thereon.

It would be a waste of time to quote authorities to prove that the question of prize or no prize is exclusively of Admiralty cognizance; a position that seems to admit of no controversy; and the only enquiry here is, whether that question must necessarily be decided, before it can be ascertained whether the Defendant has committed a wrongful conversion. The brig had been provided with *Spanish* papers to guard against a capture by the *British*, the only maritime enemy the United States then had; and she thus assumed the character of the only nation, against the vessel of which, the schooner, sailing under the Carthagenian flag, and bearing a commission, was authorized to cruize. That the province of Carthagena was in a state of revolt and rebellion to her former sovereign, and that her (296) armed cruizers were scouring the seas, to make capture of Spanish vessels, are facts of public notoriety. Whether the revolted state, claiming to exercise the right of sovereignty, could lawfully issue commission for that purpose, and whether her cruizers could rightfully make captures, are questions depending upon the laws of war, and they are to be determined by the laws of nations, and not by the municipal laws of any country. The jurisdiction of a Common Law Court, administering a code not common to other nations, is ousted, whenever it appears that the capture was made in a hostile character, whether properly acted upon or not: and whenever the jurisdiction of the Admiralty has once attached by the taking as prize, nothing subsequent can take it away.

But assuming the principle that this Court was at liberty to examine the authority of the commission under which the capture was made, and to pronounce it illegal, because the Carthagenian sovereignty was not recognized by our government, still as the capture was made in a hostile form, it would be piratical and equally within the Admiralty jurisdiction. This was decided upwards of two hundred years ago, and has been recently confirmed in the great case of *Le Caux* v. *Eden*, Douglas 594; to which case and to Cro. Eliz. I refer, as clearly establishing the principles on which the Court rely.

The objection that the Plaintiff would be without redress, if a Common Law Court refuse it, inasmuch as only the Prize Courts of the nation to which the captor belongs can take cognizance of the case, is completely answered by several adjudications in the Courts of the United States. In *Talbot* v. *Jansen*, 3 Dallas 133, it was decided that a Prize Court of the United States has cognizance of the capture as prize, where the property is brought within the jurisdiction; and if the capture was made without a commission, or the vessel illegally fitted out in the neutral country, is bound to make restitution. The same principle is established (297) by the case of the *Alerta*, 9 Cranch, 359, and the *L'Invincible*, 1 Wheaton, 257, 8. But a more decisive answer is, that in this case, the Court of Admiralty did exercise its jurisdiction by a restitution of the vessel, and a sale of the return cargo; and would doubtless have given damages for the illegal capture, had the Libellant thought proper to proceed for them. 3 Wheat. 546.

Two plainer propositions cannot be stated than that this subject is exclusively of Admiralty jurisdiction; and that the Prize Court was fully competent to administer complete relief and justice to the Plaintiff, upon proper application. If this Court has not jurisdiction of the subject matter, the Court cannot perceive how jurisdiction is given by the circumstance of the privateer's being fitted out in a port of the United States, in violation of an act of Congress. There is nothing in that act which can have the effect of enlarging the jurisdiction of this Court; for the offences defined in it are triable and punishable solely in the Courts of the United States. The maxim which precludes a person from availing himself of his own wrong, or setting up a defence founded in a violation of the law, pre-supposes that the Court has jurisdiction of the matter against which such defence is brought forward; but can never operate so as to confer a jurisdiction on the Court. If a person were indicted for a trespass in taking away property, in a Court having no jurisdiction of such a crime, and it should appear in the course of the evidence relied upon by him, that he committed a felony instead of a trespass, could the Court on that account convict and punish for the trespass? Or if a bill were instituted in Chancery, which, upon the face of it, shewed that there was a complete and exclusive remedy at law, would the Court sustain the bill, because the answer shewed that the Defendant had violated a positive law? I apprehend the answer to both of these questions must be in the negative.

The Court are of opinion, that a Court of Common (298) Law has no jurisdiction of the case, and that judgment be rendered for the Defendant.

GROVE WRIGHT *v.* JAMES LATHAM.

From Beaufort.

Action on the case by an indorser against an indorsee. Two counts in the declaration. 1. Upon the indorsement. 2. Upon a special agreement entered into between the parties at the time of the indorsement, that the indorsee should sue the maker of the note, and endeavor by legal coercion to obtain payment from him; and if such endeavors should prove unavailing, that the indorser should be liable. Parol evidence received to prove this special agreement, and upon proof being made thereof, &c. Plaintiff recovered.

This was an action on the case brought by an indorsee against an indorser. The bond and indorsement were as follows, to-wit:

"Five days after date I promise to pay James Latham, or order, two hundred and eighty-seven dollars, for value of him received. Witness my hand and seal, this first day of January, 1810.
Teste: ALEXANDER LATHAM." ISAAC SMITH. (Seal.)

"Pay the within note to Grove Wright, or order, for value received.
Washington, November 7, 1811. JAMES LATHAM."

The declaration contained two counts. The first set forth "that Isaac Smith, on the first day of January, A. D. 1810, by his bond under his hand and seal, at Beaufort aforesaid, promised to pay the said James Latham, or order, the sum of two hundred and eighty-seven dollars, five days after date, to-wit, on the 6th day of January, A. D. 1810; and the said James Latham, afterwards, to-wit, on the 7th of November, A. D. 1811, at Beaufort county aforesaid, by his indorsement on the said bond in writing, ordered the contents (299) thereof then unpaid to be paid to the Plaintiff, according to the tenor thereof; and the Plaintiff, afterwards, to-wit, on the 10th day of November, A. D. 1811, at Beaufort county aforesaid, presented the said bond (the same being then payable by the said Isaac Smith) for payment, which the said Isaac refused to do: whereof the said Isaac Latham then and there had notice, and thereby became liable; and in consideration thereof then and there promised the Plaintiff to pay him the contents of the said bond, according to the tenor thereof," &c.

The second count charged, "that Isaac Smith, of Beaufort county aforesaid, on the first day of January, A. D. 1810, by his bond, under his hand and seal, promised to pay to the said James Latham, or order, the sum of two hundred and eighty-seven dollars, five days after date, to-wit, on the 6th day of January, 1810; and the said James Latham, afterwards, to-wit, on the 7th day of November, 1811, for a valuable consideration, transferred the said bond to the said Grove Wright; and then and there it was agreed between the said Latham and Wright, that the said Wright should endeavor by legal coercion to obtain payment thereof from the said Isaac Smith; and if such endeavors should prove unavailing, that the said Latham should pay the amount thereof to the said Grove Wright, and the said Wright, after using all legal means to coerce payment of said bond from the said Smith, was unable to procure any satisfaction thereof; of which the said Latham, afterwards, to-wit, on the ---- day of ----, at Beaufort aforesaid, had notice; and in consideration thereof then and there promised, the said Grove Wright to pay him the amount thereof," &c.

The Defendant pleaded "the general issue and the statute of limitations." In support of this action, the Plaintiff proved the execution of the endorsement. He proved no demand

(300) on Smith, the obligor in the note, or notice to Latham, unless the evidence hereinafter set forth was properly admissible, and the facts proved, constitute in law such a demand and notice as will make Latham liable. The Plaintiff proved, by Slade Pearce, that he was present when the note was indorsed; and that the bond in suit was transferred to Grove Wright in the payment of a debt; that when this bond was offered to Wright, he refused to take it, unless James Latham would indorse it; that at the time of the transfer, it was expressly agreed between Latham and Wright, that Wright should first bring a suit against Isaac Smith, and then he might have recourse to Latham.

On the part of the present Defendant it was objected, that the testimony of Pearce was inadmissible, and should not go to the Jury, as it proved a contract variant from the contract entered into by Latham, by the written transfer, and contained a condition not set forth in the indorsement entered on the note. The Court admitted the testimony. The Plaintiff then introduced the record of the Superior Court of Law for Beaufort County, to prove that a writ had been issued on the bond in question on the 16th day of November, 1811, against Isaac Smith, by Grove Wright, assignee of Latham, returnable to Beaufort County Court at December term, 1811. The cause was continued until December, 1812, when the Plaintiff was non-suited, and appealed to the Superior Court. The appeal was returnable to Spring term, 1813, and the cause was continued till Fall term, 1814, when the death of the Defendant was suggested, and the suit abated. Slade Pearce proved that Isaac Smith was insolvent, and that, being confined in jail for debt, on or about the 17th day of May, 1813, he gave notice to his creditors that he intended to avail himself of the act providing for the relief of insolvent debtors; and, among others, a notice was delivered to him Pearce, as the agent of Grove Wright; of which he gave notice to Latham, who answered evasively.

On the abatement of the suit, and during the week (301) in which it did abate, Pearce informed Latham of the abatement, and gave him notice of his liability.

This suit was commenced on the 11th day of April, 1816. Smith and Pearce lived in the same town, and Latham about eight miles from town.

On these facts it was contended, for the Defendant, that the Plaintiff could not recover, 1, Because, on the first count in the declaration, there was no evidence of a demand or notice. 2, Because, on the second count, the Plaintiff had been guilty of such negligence as to make the bond his own. The presiding Judge charged against the Defendant, and the Jury found a general verdict for the Plaintiff. A rule for a new trial was obtained, upon the grounds, 1, That the testimony of Pearce, proving the agreement between the parties, was improperly admitted. 2. If the testimony be admissible, it did not support either of the counts in the declaration. 3. That the negligence of the Plaintiff in conducting the suit, and in giving notice, had discharged the Defendant.

The rule for a new trial was sent to this Court, and the Judges were divided in opinion—HALL and HENDERSON, Judges, being of opinion that the rule for a new trial should be discharged and judgment given for the Plaintiff: and TAYLOR, Chief Justice, being of a contrary opinion.

HALL, Judge.—The testimony of Pearce is objected to, because it is said it goes to establish the special count, and form a contract variant from that set forth in the indorsement, which is in writing. Without at all impugning the rule, or believing that it ought to be impugned, which forbids the introduction of parol testimony to alter a written agreement, I think, the testimony was properly received. A contract in writing contains, in express terms, or by natural inference, the stipulations into which the parties have thought proper to enter. What is an assignment? It is a name written on the back of a bill or note, in blank or in full, when it is expressed to whom the indorsement is made. (302) Now, who would understand any thing more even from an indorsement in full, than the indorser had parted with his interest in the bill or note, and transferred it to the indorsee? There are no words to this effect, that if the indorsee use diligence to get the money from the drawer or maker, and fail, and then give timely notice to the indorser, that he the indorser shall be liable. How then does the indorser come to stand in that predicament, when there is nothing like it stipulated in the indorsement? The law merchant has placed him in it, and fixed that liability upon him, which he has not subjected himself to by an express contract. If the law has imposed this obligation upon him, it must be for reasons founded in good policy; but when these reasons cease, the obligation loses its force. An instance may be readily given, and that is, where the drawer of a bill has no effects in the hands of the drawee; this fact does not appear from the indorsement; how does it appear? From parol evidence. If the objection to Pearce's testimony, in this case, be good, as altering a written contract, it would be equally good against the parol evidence in the case just put, where a question was never raised about it. Again, there is authority for saying, that where the drawer or maker is a bankrupt, there is no necessity of giving notice to the indorser, if he knew the fact at the time of the indorsement. How is this to be known without the introduction of parol testimony? I admit this authority has been doubted, but not as to the purpose for which I introduce it, that is, to shew that parol evidence is admissable in cases of indorsement, to do away the obligation of an indorsee to give notice, when the nature of the case does not require it. Chitty, in his treatise on Bills, 63, says, "that by the very act of drawing a bill, a man enters into an engagement with the payee, unless it be otherwise agreed, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place, &c." What is meant by the words "otherwise agreed?" do they mean that such agreement (303) shall be inserted in the indorsement, because parol evidence is not admissible to prove it? I think not—a majority of the Court are of opinion, that the parol evidence was properly received; that the rule for a new trial must be discharged and judgment be given for the Plaintiff.

TAYLOR, Chief Justice, *contra*—I cannot assent to the opinion of my brethren, which I have reflected upon with anxiety, to perceive, if I could, the fallacy of the reasoning which has led me to a different conclusion. It may, however, be obvious to others, and may hereafter become so to myself. I will state the reasoning upon which my opinion is founded.

The law has precisely ascertained the rights and duties of the indorser and indorsee, respectively, resulting from an indorsement, made as this is in the usual form. The indorser undertakes that if the indorsee present the note to the maker in due time, the latter will pay it according to its tenor; and that if he fail to do so, he himself will, upon receiving notice of the failure of the maker, pay the amount in all cases, where notice is not dispensed with by the law in consequence of certain circumstances; and that where it is so dispensed with, he will pay without notice. In this case, the testimony of Pearce would add to the indorsement which is in writing, a parol stipulation, tending to increase the duties of the indorsee, and to weaken and circumscribe the responsibility of the indorser. The admission of such evidence is, in my opinion, not only calculated to produce all the danger and confusion, to avoid which is the professed design of excluding parol evidence in any case, to add to a written contract, but is at variance with a current of authorities, the force of which has been often recognized by this Court.

In an action brought by the assignee of a bond, upon a written assignment in general terms, parol evidence was offered to shew that the Defendant had expressly guaranteed the payment of the bond; but it was rejected as an (304) attempt to charge the assignor beyond the plain words and meaning of his written contract. 4 Dallas, 340. On the sale of a slave, the Defendant warranted the title in writing, which was a bill of sale in all other respects, except that it was unsealed, the Plaintiff declared on a warranty of soundness, and offered to prove by parol, that the slave was unsound; but the Court rejected the evidence. 1 Law Repos. 263. Where the parties in the sale of a ship reduced the contract to writing by a bill of sale, it was held that no action would lie on a parol warranty made at the time of sale, no fraud being alleged; it being a rule of law, that whenever a contract is reduced to writing, the writing is to be considered as the evidence of the agreement, and every thing resting in parol becomes thereby extinguished. 1 Johns, 414.

An attempt has been made to distinguish this case from the cases quoted, and a multitude of others belonging to the same class, on the ground, that the indorsement says nothing about notice; that the duty of giving notice results by operation of law, and therefore parol evidence shewing that the parties dispensed with it, or substituted something else for it, does not vary the written contract. To my understanding, the principle seems to be the same, whether the terms of a contract be distinctly stated by the parties, and its effects and consequences put down in writing, or whether they be annexed to it by operation of law. In both cases it is the contract of the parties, and parol evidence to change it, is alike dangerous in both. Let us see whither the principle will lead us. The words "grant and demise" imply a warranty in a lease for years: yet, if the doctrine contended for by the Plaintiff be correct, it would be right to prove by parol, that it was agreed the lessor should not warrant. If a man enter into a covenant without naming his executors, they are liable by operation of law, yet it might be shewn, that the parties agreed they should not be liable. A (305) man who covenants to pay rent, is liable to do so, although the house be destroyed by fire; yet he might prove a parol agreement that he should not be liable.

In addition to this, it appears to me that the distinction has been considered and found untenable by several adjudged cases. In Hogg *v.* Smith, (1 Taunt. 347) it was held that parol evidence cannot be received to control the *legal import* of a known commercial instrument. In Thompson *v.* Ritchan, (8 John. 189) a note for the payment of money, in which no time of payment was specified, was declared on. The note was executed in Jamaica, and the Defendant offered no evidence to show a parol agreement that the money was to be paid on the arrival of the parties at New York. But it was refused, on the ground that the time of payment was part of the original contract; and if no time of payment be expressed in a note, the law adjudges it to be payable immediately. What was said by the Chief-Justice in that case, appears to me to cover all the ground taken by the Plaintiff in this. "When the operation of a contract is clearly settled by general principles, it is taken to be the true sense of the contracting parties; and it is against established rule to vary the operation of a writing by a parol proof." I would then ask, if the operation of this endorsement is not clearly settled by general principles of law? If so, it was the true sense of the contracting parties, that notice should be given to the indorser of the drawer's delinquency; consequently, it cannot be right to vary that obligation by parol proof.

(306)

STARKEY SHARPE *v.* WILLIAM and JAMES JONES, executors of the last will of JAMES JONES, deceased, and against JOHN WINBORNE.

From Hertford.

Debt on a note sealed by one obligor, but not sealed by the other. The Defendants plead severally. The executors of one obligor pleaded the "general issue, and fully administered." The other obligor pleaded the "general issue and statute of limitations." The Jury found the plea of "the statute of limitations," they found against the other Defendant, from which he appealed, and in the Superior Court it was moved to dismiss the appeal, because he alone had appealed, and there were other Defendants. Motion to dismiss disallowed, for,

By the act of 1789, ch. 57, suits may be brought and prosecuted on all joint obligations and assumpsits, in the same manner as if they were joint and several.

If an assumpsit be brought against two, the Jury may find against one and in favor of the other; so that the judgment to be given against the parties in this action is not joint.

The act of 1777, ch. 2, gives the right of appeal to any person, either Plaintiff or Defendant, dissatisfied with the sentence, judgment, or decree of the County Court.

The rule in writs of error is, that all persons against whom a joint-judgment is given must join in it; or, if any of them refuse, he or they must be summoned and served.

There is an absurdity in requiring a party to join in the prosecution of a writ of error, in whose favor the judgment below had been rendered; and summons and severance apply only where the judgment was given against a party who will not join. The like rule prevails with respect to appeals.

As to the plea of the statute of limitations: The note was given and became due in 1810; suit was brought in 1816. The act of 1814, ch. 17, does not allow three years after its passage for bringing actions of debt upon simple contract, where the cause of action then existed; but limits the bringing of the action to three years "after the cause of action accrued." And here the cause of action having accrued in 1810, the action was barred the moment the act was passed.

This was an action of debt brought upon the following note, to-wit:

> We promise to pay Starkey Sharpe, one hundred pounds, with (307) interest from the first day of January last, for value received, as witness our hands and seals this 22d June, 1810.
>
> JAMES JONES, (Seal.)
> JNO. WINBORNE, (Seal.)
>
> Witness,
> JNO. ASKEW.

The suit was commenced in May 1816, and the Defendants pleaded severally. The executors pleaded "general issues and fully administered." The Defendant, Winborne, pleaded the "general issue and statute of limitations." Upon the trial in the County Court, the jury found for the executors upon their plea of "fully administered," and against

Winborne upon his plea of "the statute of limitations." From the judgment of the County Court, Winborne appealed, and in the Superior Court a motion was made to dismiss the appeal, upon the ground that Winborne alone had appealed. The case was sent to the Supreme Court upon the motion to dismiss the appeal, and upon the further point made in the case, whether under the act of 1814, ch. 17, the Defendant, Winborne, could avail himself of the statute of limitations in this action, the note having been executed and become payable before the passage of the act.

Upon the first point, the Court were unanimous that the appeal was rightfully granted, and the motion to dismiss should be disallowed, Upon the second point, TAYLOR, Chief Justice, and HENDERSON, Judge, were of opinion that the statue of limitations barred the Plaintiff's demand; and HALL, Judge, was of a different opinion.

TAYLOR, Chief-Justice.—This being a joint obligation, the remedy at Common Law would have survived against Winborne; and if suit had been brought against the executors alone, they might have pleaded the survivorship in bar, or have given it in evidence under the general issue. Engs. *v.* Donnithorne, 2 Burr, 1196. Postan *v.* Stanevy, 5 East. 261. But the remedy is extended by act of Assem- (308) bly against the heirs, executors and administrators of the deceased obligor, as well as against the survivor; and suits may be brought and prosecuted on all joint obligations and assumpsits, in the same manner as if they were joint and several. Act of 1797, ch. 57. In this case the pleas were several: "the general issue and fully administered" were entered for the executors, and "the general issue and statute of limitations" for Winborne The finding of the Jury was several; for it does not appear that a judgment of *quando* was prayed against the executors; they went without day, while a judgment must be supposed to have been rendered against Winborne upon the statute of limitations.

It has been decided in this Court, that under the broad expressions of the act of 1789, if an assumpsit be brought against two, the Jury may find against one and in favor of the other, thus severing by their verdict a joint contract, upon which the suit was brought. From all this it is evident, that the judgment against the parties in this action was not joint. Now the rule in writs of error is, that all

persons against whom a joint judgment is given must join in it; (Walter *v.* Stokoe, 1 Ld. Ray. 71) or, if any of them refuse, he or they should be summoned and severed. Carth. 8. But if there be five Defendants, and three be acquitted, the writ of error be prosecuted by the two alone. Vaughan *v.* Loriman and others, Cro. Jac. 138. In some cases they must all join, where the judgments are, in their nature, several; as where an action is brought against three executors, one of whom pleaded "*plene administravit*" generally, upon which the Plaintiff took judgment against him of assets *quando*, &c. and the other two Defendants pleaded judgments, *et plene administraverunt ultra*: the Plaintiff replied that the judgments were obtained by fraud; and, upon the trial, had a verdict: whereupon those two Defendants brought a writ of error, and the Court held that all three ought to have joined. 1 Wilson, 88. But though
(309) the judgments in that case were several, yet they were rendered *against* all three of the Defendants; and I believe no case is to be found where a party who is discharged by the judgment is necessarily to be joined; and one of the cases cited shews it would be error to do so. Indeed there is an apparent absurdity in requiring a party to join in the prosecution of a writ of error, in whose favor the judgment below had been rendered; and summons and severance apply only where the judgment was given against a party who will not join.

This being the law in relation to writs of error, no reason occurs why it is not alike the rule with respect to appeals. An appeal is a proceeding by statute to remove the cause altogether, for the purpose of reconsidering both the fact and the law. A writ of error is founded on the Common Law, and operates only by reconsidering the law. Both are regulated by the act of 1777, ch. 2, and in language of nearly the same import. There is, indeed, a slight variation in the description of the parties: "where any person or persons, either Plaintiff or Defendant," are the terms used with respect to appeals; but "where any person" are applied to a writ of error, the latter seeming to contemplate only one party. If the trial below was an issue to the contrary, the trial upon appeal shall be *de novo*: by which I understand the trial of that which is appealed from, which, in this case, is the finding of the jury against Winborne on the statute of limitations. It is true, that the Plaintiff will be obliged in the

Superior Court, to satisfy the words of the act and make it a trial *de novo;* but the idea I mean to convey is, that it is only meant to be *de novo* as to the party against whom the judgment was given in the Court below, and who alone has appealed therefrom. Whether the analogy to writs of error would be strictly enforced, where the judgment was rendered against all the Defendants, though but one appealed, is a question of some nicety, which, whenever it occurs, will merit consideration. I perceive that, in one of the states, in giving a construction to an act of Assembly substantially the (310) same with ours, the Court considered that where one Defendant appealed, he appealed for all the others, none of whom had entered into the recognizance which the act required. 2 Tyler 396—Hurlbut *v* Meachum. Upon the first question, I am clearly of opinion, that the appeal was rightly constituted in the Superior Court.

Upon the other ground also, I am of opinion the Defendant is entitled to judgment. The Legislature have undertaken to prescribe the time within which actions shall be brought, which it is perfectly competent for them to do; and this action was not brought within three years after the cause of action accrued.

Hall, Judge—In this case the Defendants have severed in their pleading, and one of the pleas pleaded by the Executors has been found for them, namely, the plea of "fully administered," by which they are discharged. The Plaintiff has neither moved for a new trial, nor appealed. The plea of the statute of limitations pleaded by the Defendant Winborne, has been found against him, and he has appealed. It would seem to be a hard case upon the Executors, if they were also bound to appeal on that account. It would also be a hard case upon Winborne, if he could not appeal, because the Executors would not join him in it. They have nothing to appeal from; he has a judgment against him, from which he ought to be at liberty to appeal. Suppose there is no appeal; the Plaintiff is bound to pay the Executors their costs, and an execution would issue for that purpose. Judgment being against Winborne, execution would issue on behalf of the Plaintiff against him; so that there would be different or cross executions, issuing from the same Court, and I see no good reason why the same executions might not issue from different Courts; that is, from the County

Court, and the Superior Court, to which latter Court part of the case is carried by appeal. In the case of Stock- (311) still *v.* Shuford and others (Conf. Rep. 556), where the Defendants pleaded severally in trespass; some of the Defendants were acquitted, the rest were found guilty. It was held, that those acquitted were entitled to their costs; those found guilty were bound, of course, to pay the amount of the judgment against them and costs. I am of opinion, that the Defendant, Winborne, was at liberty to appeal, without being joined by the Executors in such appeal.

As to the statute of limitations, I think, the act of 1814, ch. 17, began to operate upon the note on which this action is brought, when it became a law, and not before; and that it began to operate upon it at that time, in the same way it would have done, provided the note had been given after the act had become a law. I am of opinion that judgment should be given for the Plaintiff.

NOTE.—The act of 1814, ch. 17, declares that "all actions of debt, grounded upon any lending or contract without specialty, which shall be sued or brought, after the ratification of this act, shall be commenced or brought within three years next after the cause of such action or suit, and not after;" with a saving for infants, femes covert, persons of unsound mind, imprisoned or beyond seas.

(312) HENRY BRANSON *v.* JOSEPH GALES.

From Wake.

In a conversation between A and B, relative to a purchase of a pair of horses, the price was agreed upon; but A said he could not spare the horses until they had made another trip in the stage. B agreed to deposit the money with C, and when the horses had made another trip in the stage, and A ascertained that B had deposited the purchase money with C, he was to deliver the horses to the stage-driver for B. Before the trip was completed, the horses ran away with the stage, and one of them got much injured. A tendered the horses, and demanded the purchase money deposited with C. He is not entitled to the money, because the right to the horses was not changed, the contract of sale not being complete.

This was an action of assumpsit, brought to recover from the Defendant, as agent for one Bailey, the sum of three hundred dollars, the price of a pair of horses, which the Plaintiff alleged he had sold to Bailey. The case was, that Bailey had a conversation with Branson relative to the purchase of a pair of horses, which were then driven in Branson's stage: they agreed upon the price, but Branson said he could not spare the horses until they had taken another trip; that by the time they should make this trip and return to Fayetteville, Bailey would be able to satisfy him that the purchase money was lodged in the hands of the Defendant, Joseph Gales, at Raleigh: upon the ascertainment of which, Branson was to deliver the horses to the stage-driver upon Bailey's account, the stage-driver having agreed with Bailey to take the horses from Fayetteville to Raleigh, and to drive them thence to Charleston with Bailey's family. On the arrival of the stage-driver at Fayetteville, the horses took a fright and ran away with the stage, and one of the horses was thereby so injured, that he was rendered utterly unfit for taking Bailey's family to Charleston, the purpose for which they were wanted. The stage-driver left Fayetteville in order to join Bailey at Raleigh, who, he expected, would procure other horses; and according to his, the stage- (313) driver's understanding of the contract, the horses were not to be considered as Bailey's property until they were delivered to him, the stage-driver, to take to Bailey; which was not to take place until Branson had received the price, or was satisfied as to the deposit. The Jury found a verdict for the Defendant, and a rule for a new trial was obtained upon the ground, that the contract of sale was complete before the horse received the injury, and the Plaintiff became entitled to the money deposited with the Defendant, as soon as the deposit was made. The rule was sent to this Court; and

BY THE COURT.—Let the rule for a new trial be discharged.

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(314) KINCHEN KITCHEN *v.* JOHN TYSON.

From Moore.

Assumpsit for goods sold and delivered. Defendant pleaded a *set-off*, to support which, he introduced his book, containing an account against the Plaintiff, and was sworn under the book debt act (1756, ch. 4,) as a witness to prove the items in the account. The Plaintiff then offered witnesses to prove that the Defendant was a man not worthy of belief when upon oath. Such witnesses admissible; for

The act of 1756, ch. 4, only removes the *incompetency* of the party, who is examined as a witness to prove his account, it leaves his credibility open to be enquired into by a Jury.

The act uses the words "to make out by his own oath or affirmation," and "to prove," as synonimous. *To prove* a fact, signifies not merely to swear to it, but to establish its truth by a credible witness.

Where a statute uses a word, the meaning of which is well ascertained at common law, the word shall be understood in the statute in the same sense in which it is understood at common law.

Where the provision of a statute is general, it is subject to the control and order of the common law.

If a person is allowed by a statute to be a witness, who was inadmissible at common law, he becomes at once affected by all the rules and principles which appertain to that character. If the statute removes one disability, all others remain in full force and application.

This was an action of assumpsit, to which the Defendant pleaded a set-off. At the trial, the Defendant, being the keeper of a house of entertainment at Moore Court-House, offered in evidence his book, containing an account against the Plaintiff for boarding and lodging, amounting to eleven dollars. He proved by a witness that the Plaintiff often lodged at his house, but the particular items for boarding and lodging, could, as Defendant swore, be proved only by his own oath. He was examined under the book debt law, and swore to the items in his account. The Plaintiff then moved for leave to introduce witnesses to prove that the Defendant was a man not of credit, and unworthy of belief when upon oath. This was refused by the Court, and there was a verdict for the defendant. A rule for a new trial being (315) obtained upon the ground that the testimony offered was improperly rejected, the rule was discharged, and the Plaintiff appealed.

TAYLOR, Chief Justice, delivered the opinion of the Court: The Defendant pleaded a set-off to an action of assumpsit, and supported it by his book, which contained an account against the Plaintiff, the items of which he proved by his oath. The Plaintiff offered witnesses to prove that the Defendant was a man unworthy of belief when on oath; but the Court refused to receive them, and a verdict was found for the Defendant. This appeal is brought up by the Plaintiff, on account of the rejection of these witnesses. The act of 1756, ch. 4, forms an important exception to the rule of the common law, which prohibits a party from being a witness in his own cause: and considering the danger of the exception, and the temptation it offers to fraud and perjury, the privilege ought not to be extended further than the words of the act warrant. It is in restraint of the common law, and ought to be construed strictly. 2 Inst. 455. According to the terms of the act, the book shall be given in evidence, if the party *make out by his own oath or affirmation*, that it contains a true account of all the dealings, or the last settlement of accounts between the parties, and that all the articles therein contained, and by him *so proved*, were *bona fide* delivered. *To make out by his oath* and *to prove*, are here used as synonimous terms, and they are clearly so, in the common use and acceptation of language. Now it is a rule, that when a statute makes use of a word, the meaning of which was well ascertained at common law, the words shall be understood in the same sense it was at common law. 6 Mod. 143. *To prove* a fact, signifies not merely to swear to it, but to establish its truth by a credible witness. When the act allows the party to be sworn as a witness, it only removed his incompetence, and was directory to the Court to admit him: (316) But when it requires him to prove or make out certain facts by his oath, it leaves his credibility open to be enquired into by a Jury. Even as to his competency, the statute cannot be understood to extricate the party from any other disqualification than that created by his interest: it leaves him exposed to all other existing exceptions. Shall a party be permitted to swear to a book debt, who wants understanding? Or who has been convicted of an infamous offence? Yet the same reasoning which is employed to shew that the Jury are bound to believe a party admitted under this act, tends equally to prove that the Court is bound to receive his testimony under all circumstances. It is a salutary rule of construction, that where the provision of a statute is general, it is subject to the control and order of the common law. 1 Show. 455. If a person is allowed by a statute to be a witness, who was inadmissible at common law, he becomes at once affected by all the rules and principles which appertain to that character. If the statute removes one disability, all others remain in full force and application. The unavoidable consequence of excluding proof of the character of a witness is, that the Jury are bound to believe him; are not at liberty to weigh his evidence; and are deprived of those means of judging of its truth, which are supposed to be connected with a *viva voce* examination, arising from the witness' manner and behaviour, and his mode of giving evidence. What is this but to take from the Jury their peculiar attribute of judging of credibility, and setting up a speaking automaton, a mere machine, whose utterance of certain sounds shall compel them to overwhelm the opposite party with injustice? A verdict founded upon the testimony of a witness who is destitute of all moral and religious obligation, and strongly tempted by interest to give to polluted principles the most mischievous operation, if it be not called a perversion of justice, must want a designation. The law could never intend so great an incongruity, as that a witness, whose testimony would not be believed, when given in the (317) case of others, should in his own, receive implicit credence: That infamy alone shall disqualify him, but when interest is superadded to infamy, it shall restore him: That in one case he is sworn, in order that the Jury, by estimating what degree of credit he is entitled to, may ascertain the truth of facts: In the other he is sworn, that the Jury may find a verdict in his favor, without caring or enquiring, whether his evidence be true or false.

By the act, the book is also made evidence, if supported by the oath of the party, nor is it competent for the Jury to judge of the credibility of the book, if they cannot do so with respect to the party, for they both stand upon the same footing. But the Court is of opinion, that both are governed by the common law principles of evidence. The book may be incompetent, if it appear to the Court either that the matter in dispute is not a book account, or that the party hath other means of proving a delivery of the articles, than by his own oath; or that it doth not contain a true account of all the dealings between the parties, or the last settlement of accounts, or, in short, for the want of any of those circumstances which must be established, before the book, by the terms of the act, is admissible in evidence: and when admitted, its credibility is to be weighed by the Jury. Books may exhibit, on their face, material and gross alterations, fraudulent appearances and circumstances, suspicious entries, and various exceptions, which it would be impossible to enumerate. The Jury are to consider whether, under all its aspects, it be entitled to their belief.

It is therefore ordered that a new trial be granted, and that upon the trial, the Plaintiff be permitted to adduce proof that the Defendant is unworthy of belief when on oath.

(318)

JOHNSON Administrator, &c. *v.* BLAKE BAKER.

From Warren.

Testator gave to his wife "all the property he received with her; and the rest of his estate he gave her till his son should come to lawful age, when the same should belong to him; and, in the meantime, directed that his son be maintained and educated at a reasonable expense out of his estate, in proportion to the value of all the property and its general profits and income." The widow died, leaving her son surviving her, who died before he attained the age of twenty-one. The legacy to the son vested in him on the death of the testator, and did not lapse by his death before twenty-one.

The words "till his son should come to lawful age, when the property should belong to him," do not import a contingency; they only mark the time when the remainder limited by the will is to vest in possession; the demise being considered as made subject to the intermediate estate created out of it, and made an exception to it.

This does not conflict with the rule, that where a devise or bequest is made to a person when he shall attain twenty-one, without any disposition of the property in the meantime, that generally such devise or bequest is conditional, and will not vest before the arrival of that period. For the word "*when*" standing by itself and applied to legacies, is a word of condition: but an exception is made to the rule, where the testator has disposed of the intermediate interest either to a stranger or the legatee.

The question in this case arose upon the following clause of the will of Robert Bignall: "I give and bequeath to my said wife all the property I received with her, to her and her executors and administrators; and the rest of my estate I also give her till my son comes to lawful age, when I will that the same shall belong to him: and in the meantime, it is my will and desire that he be maintained and educated at a reasonable expense out of my estate, in proportion to the value of all my property and its general profits and income." Elizabeth, the widow, died in 1795, leaving her son, whose name was Robert, surviving her, who died before he attained the age of twenty-one: and the question in the case was, whether the legacy to Robert vested in him (319) on the death of the testator, or lapsed by his death before twenty-one.

TAYLOR, Chief-Justice, delivered the opinion of the Court: If this case were considered on the ground of intention merely, I apprehend, no doubt could exist that the testator meant an immediate vesting of the remainder in his son, and not to place it on the contingency of his arrival at age. Otherwise, if the son should marry, have issue, and die before twenty-one, that issue would be unprovided for: a consequence which certainly never could have been intended by a man who had but two objects, on whom to bestow his bounty, a wife and an only child. But further, he directs that his son should be maintained and educated out of the profits and income of his property; and this shews that the time of the enjoyment of the property was postponed, with the twofold view of benefit to the wife, and that his son should be qualified to manage it when he came to the possession.

And this construction of the will is borne out and sustained by a series of authorities, strongly bearing on the point, and, which consider the words used in this will as seeming only to import a contingency, though, in truth, they convey no additional meaning. A vested remainder is limited by the will, and these words mark the time when the remainder is to vest in possession, the devise being considered as made subject to the intermediate estate created out of it, and made an exception to it. The case of *Boraston* in 3 Coke, 19, establishes this doctrine; but *Mansfield* v. *Dugard*, in Gilbert's Eq. Rep. is so much in point that it merits particular observation. A man devised certain lands to his wife until his son and heir apparent should attain to his age of twenty-one years; and when his son should attain to that age, then to his son and his heirs, and died. The son lived to the age of thirteen, and then died; and the wife, supposing that she had a title to hold the lands till such time as the son would have attained his age of (320) twenty-one, in case he had lived to that time, continued in the perception of the rents and profits of the said lands for several years; and the bill was brought against her by the heir at law of the son, to have an account of the rents and profits from the death of the son. And though the wife was likewise executrix of the husband, yet it not being devised during that time for payment of debts, nor any creditor or want of assets appearing, it was held by the Chancellor that the wife's estate determined by the death of the son, and that the remainder vested personally in the son upon the testator's death, and was not to expect till the contingency of his attaining his age of twenty-one years should happen; for then, in this case, it never would have vested; he dying before that age; and, therefore, decreed the wife to account for the profits from the time of the son's death.

The case before us is something stronger, as there is a trust created for the education and maintenance of the son; and as the testator makes a different disposition of the estate he acquired by his marriage, giving the whole of that to his wife. His meaning is evidently the same as if he had said, "All the property I received with my wife I give her absolutely; and, as to the rest of my property, I allow her to enjoy it till my son come of age, when he is to be put into possession; but, in the meantime, be educated and maintained out of the income of both parts."

The following cases support the general doctrine: Hayward *v.* Whitly, 1 Burr. 228. Doe. *v.* Lea, 3 Term. Rep. 41; though, in point of circumstances, they are distinguishable from this, inasmuch as trustees were interposed to manage the estate for the benefit of the infant legatee. But the case of Mansfield *v.* Dugard was clear of this feature; and, being a devise to the widow for her own benefit, whatever was the proper construction on that will, must be alike proper on this. Its authority has been always admitted since (321) the decision; and in Hanson *v.* Graham, 6 Vesey, 239, the Master of the Rolls remarks upon it, that it was clear the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit to the wife; but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate.

It ought to be understood, that the determination in this case does not conflict with the rule, that where a devise or bequest is made to a person when he shall attain twenty-one, without any disposition of the property in the meantime, that generally such devise or bequest is conditional, and will not vest before the arrival of that period. For the word "*when*," standing by itself and applied to legacies, is a word of condition. But an exception is made to the rule where the testator has disposed of the intermediate interest either to a stranger or the legatee. It was upon this distinction that the case of Perry *v.* Rhode's administrator was decided. 1 L. Rep. 82. The plaintiff is entitled to judgment.

THOMAS PERSON *v.* ALEXANDER CARTER and JAMES PORTER.

From Wayne.

Case for money laid out and expended, &c. The firm of "Carter & Porter" were indebted to the Bank of Newbern. Carter was the active partner, and purchased of Fletcher a bond on Everitt, for the amount of which he executed to Fletcher an obligation under seal, in the name of the firm "Carter & Porter," and Person sealed and delivered the said obligation as their security. Upon Carter's application, Everitt took up his bond, and gave in lieu thereof to "Carter & Porter" a note, which was discounted at the Bank of Newbern, and the proceeds applied to the discharge of "Carter & Porter's" note due to the Bank. Person paid to Fletcher the amount due on the bond which he had executed as security for "Carter & Porter," and brought this action to be reimbursed.

Porter was not present when Carter executed the bond to Fletcher, (322) and a question was made whether, as this was a bond in which one partner could not bind another, Person had not made Porter his debtor without his, Porter's, consent, and therefore not entitled to recover of him in this action. There was no evidence that Porter was privy to the contract with Fletcher, or had recognized it as a contract of the firm, except what was furnished by an order drawn by Porter on one Isaac Hill in favor of Person, in which he directed Hill to let Person have "any amount of notes or judgments to the amount of a note of Carter & Porter, given to Joshua Fletcher." Held that this was evidence of a recognition of a subsisting contract of Carter & Porter and bound Porter, although he was not present when the bond was executed.

One partner cannot bind another partner by deed, by virtue of the mere contract of partnership; to do so, he must either have express powers under seal, or the other must be present and assent to the act.

If this case then stood on the bond alone, although the money arising from the contract was applied to Porter's use, or to the joint use of Porter & Carter, without the assent of Porter, he would not be liable in this action; for no man can make another his debtor without his consent, express or implied. But this assent may be implied from circumstances, and, when implied, it has the same effect as the most express assent.

Although Carter had no power to sign the bond, so as to bind Porter, yet the bond may be used to shew *in what capacity Carter professed to act.* He professed to act for the firm of "Carter & Porter," as their agent. The money raised by the contract was applied to the use of the partnership; Porter recognized the bond as the bond of the firm, and gave direction for its payment. It was Porter's bond only through Carter's agency for the partnership; and his recognition of it as a bond of the firm cannot be true, otherwise than by a recognition of Carter's agency.

Porter not only recognizes the bond as the bond of the firm, but takes benefit of the effect of the contract, and assents to the extinguishment of his own debt; and having *knowingly* received the benefit, he shall also take the burthen, and do the same thing as if he had personally transacted the business.

This was an action of assumpsit, in which the Plaintiff declared for money laid out and expended, for money lent, for money had and received, &c. The Defendants were partners in trade in the sale of merchandise, at a store in Wayne county, which was conducted by Carter, Porter residing in an adjoining county. In the year 1812, the firm of Carter & Porter were indebted to the Bank of Newberne; (323) and Carter, for the purpose of discharging said debt, purchased of one Joshua Fletcher a promissory note on Joseph Everitt, which was payable to said Fletcher, and gave an obligation to Fletcher for the amount, payable in other notes, which obligation was signed by Carter, in the name of the firm, "Carter & Porter," and a seal was annexed thereto; and the same was signed and sealed by Thomas Person, and two other persons as securities. James Porter was not present at the time of the giving of the obligation, nor was there any evidence produced, except the circumstances hereinafter stated, to shew that he was privy to the contract with Fletcher.

Everitt, upon the application of Carter, took up his note, made originally payable to Fletcher, and by him delivered to Carter, and gave a new note, payable to Carter & Porter; which note was subsequently discounted at the Bank of Newbern, and the proceeds applied to the discharge of Carter & Porter's note then due the said Bank. Person paid Fletcher the amount due on the note given him by Carter, and brought this action to be reimbursed.

On the trial, the Plaintiff produced an order which was in the following words, to-wit:

> "Mr. Isaac Hill, be so good as to let Mr. Thomas Person have any amount of notes or judgments to the amount of a note of Carter & Porter, given to Joshua Fletcher, &c. April 22, 1815.
>
> "JAMES PORTER."

Which order bore date prior to the bringing of this action. The Judge, in his charge, instructed the Jury that one partner cannot, by deed, bind his copartner, unless the copartner be present, assenting to the execution of the deed as the deed of the firm; or unless he had previously requested or consented that he might so execute it; in which case, the partner so executing it, would be considered as the agent of the party so assenting, and the one so assenting would be bound by the deed. That the Jury, if satisfied from the circumstances disclosed by the testimony that such was the fact, should find for the Plaintiff. That if the Defendant, (324) Carter, in signing the obligation in the name of the firm, acted without any legal authority from Porter, yet, if Porter subsequently promised to pay the Plaintiff the money so by him paid for the firm, such promise would be binding; and that the order drawn by Porter on Hill was a fact from which the Jury might infer such promise.

The Jury found for the Plaintiff. A rule for a new trial was obtained on the ground of misdirection by the Court, and on argument was discharged. The Defendant appealed, and

HENDERSON, Judge, delivered the opinion of the Court:

A contract of partnership is a contract of agency, and it differs from a pure agency only in this, that, in a pure agency, the agent binds his principal only; in a partnership all the principal or partners are bound, which, of course, includes the actor. On this principle is bottomed the powers of one partner to bind the partnership, when he acts within the scope of his powers. How far those powers extend, is generally ascertained by the nature and objects of the copartnership; and this depends on the agreement of the parties evidenced between themselves, generally by an express contract, and as to the world, in addition thereto, by overt acts or visible signs. (I speak not of what makes a man a secret Partner.) These visible signs may be exhibited after a transaction of agency, as well as be concomitant with or before it. For technical reasons, the contract of partnership does not give one partner a right to bind the partnership by deed. To do so, he must have express powers, (under seal as I apprehend,) or he must be actually present and assent to the agency. But be that as it may, the power does not flow from the bare contract of partnership; it rests on some other basis; either one of those before mentioned, or some other.

If this case then stood on the bond alone, which (325) Carter signed for himself and Porter, and which Person joined in as security, although the money arising from the contract was applied to Porter's use, or the joint use of Porter and Carter, without the assent of Porter, he would not probably be liable in this action: for no man can make another his debtor without his consent express or implied. But this assent may, from circumstances, be implied, and when implied it has the same effect as the most express assent. Now, although Carter had no power to sign the bond, so as to bind Porter, yet the bond may be used to shew *in what capacity Carter professed to act.* In this case *he* *professed* to act for the concern of Porter and Carter, as their agent, to bind them by their deed. The money raised by the contract was applied to the use of the partnership, and (which is the key-stone of the case) Porter recognizes it as the bond of Porter and Carter, and gives direction for its payment, *describing it as the bond of Porter and Carter.* It was not otherwise Porter's bond, than through Carter's agency for the partnership. How can Porter's recognition be true, otherwise than by a recognition of Carter's agency? He not only by words recognizes the agency, but takes benefit of the effect of the contract; assents to the extinguishment of his own debt, but refuses to take on himself those obligations which his situation as principal or partner imposes. His conduct is, in effect, this; I will recognise the acts of Carter so far as they benefit me, but will not take on myself the liabilities arising from the same transaction. The refutation or exposure is plain If Carter had not an express binding power from Porter to bind the partnership in this transaction, Porter had his election of disavowing the contract; and it was not required of him to make an express disavowal, a refusal or omission to take any benefit under it would have been sufficient. But having knowingly received the benefits resulting therefrom, he shall also take the burthen, and he shall do the same thing as if he had personally transacted the business. He shall assume all the intrinsic obligations of the actor. In this we do him no injustice, and in (326) this he cannot complain. We impose on him only the intrinsic obligations arising out of his situation, which he voluntarily assumed, and the beneficial effects of which he is now enjoying. Cases may be found, in which, under circumstances somewhat similar to this, recoveries have not been effected; but in which all the principles of law contended for in this case are admitted, and the mistake, if there be any, is in their application. The case in 2 John. 213, is somewhat like this; but wanting an essential part, and that is, the recognition of the bond as a partnership bond. I feel myself imperiously bound by precedents settling or recognising the rules or principles of law. Knowingly to run counter to them when well settled, would be contrary to the duty which I owe to the state, and contrary to the duty which I owe to myself. But as to those cases which only *apply* principles, which *do not profess to establish or investigate what the principles are*, I confess, I do not feel myself bound by them, if I cannot perceive the propriety of the application. In fact, they are looked into as mere exercises, as practising lessons, to enable the Judge the more easily to apply the rules of law; but it was never intended that we should look to the *result* to ascertain what the *rule* is. When there is no controversy about the rule on either side, the only question being about the application, the rule is not to be found in the result. Such cases are mere practising lessons; if right, there will be the like decisions again, (I will not say they will be followed,) if wrong, they will be disregarded, as cases where the rule is misapplied.—The rule for a new trial must be discharged.

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(327) LOUISA DICKINSON *v.* JOEL DICKINSON.

From Beaufort.

Petition for divorce from the bonds of matrimony, for adultery committed in the years 1812 and 1813.—The petition dismissed; for

The act of 1814, ch. 5, is the only law which gives authority to the Courts to take cognizance of the subject of divorce. The adultery charged was prior to the passage of this act; and the act shall not be so construed as to have a retrospective operation: because,

Before the passage of the act of 1814, adultery was punishable only by a fine. To superadd to this liability, a deprivation of the marital rights, under the act of 1814, would be to *increase* the punishment of the offence; and this would be contrary to the 24th section of the bill of rights, which declares that "no *ex post facto* laws ought to be made."

Ex post facto Laws are of different kinds.

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
2. Every law that aggravates a crime, or makes it greater than it was, when committed.
3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.
4. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

The enhancement of a crime or penalty, seems to come within the same mischief as the creation of a crime or penalty.

To every petition for divorce there must be an affidavit appended, that the facts charged have existed and been known to the petitioner six months before the filing of the petition.

This was a petition filed under the act of 1814, ch. 5, praying for a divorce *a vinculo matrimonii* or *a mensa et thoro* at the discretion of the Court. To support the first prayer, the petition charged that the Defendant had separated himself

from the petitioner and lived in a state of adultery in the year 1812 or 1813, for the space of six months; and the Jury, upon an issue submitted to them, found this charge to be true. To support the second prayer, the petition charged the Defendant with cruel treatment to the petitioner, and with having offered to her person intolerable indig-
(328) nities. The Jury negatived these charges; and the question arose, whether the petitioner were entitled to have a decree made separating her from the bonds of matrimony, the adultery charged in the petition and found by the Jury, having been committed *before* the passage of the act of 1814, ch. 5.

Another question was made in the case, and that was as to the sufficiency of the affidavit made by the petioner at the time of filing her petition. The affidavit set forth that "the facts stated in the petition were true, and that the complaint was not made out of levity or by collusion between the petitioner and her husband, for the purpose of a separation, but in truth and sincerity for the causes contained in the petition." It was contended, that the act of 1814, ch. 5, required the affidavit to set forth, that the facts which formed the ground of the complaint had existed and had been known to the petitioner at least six months prior to the filing of the petition.

TAYLOR, Chief Justice, delivered the opinion of the Court:

The act of 1814, ch. 5, is the only law which gives authority to the Courts to take cognizance of the subject of divorce. The first section of that act authorizes the Court to decree a divorce *from bed and board*, or from the *bonds of matrimony*, at the discretion of the Court, on proof of natural impotence, or that either party has separated him or herself from the other, and is living in Adultery. And a subsequent section authorizes the Court to decree a divorce from bed and board, in cases where the husband either abandons his family, maliciously turns his wife out of doors, endangers her life by cruel treatment, or offers intolerable indignities to her person. The verdict of the Jury has negatived the charges in the petition, relative to the cruelty and personal ill-treatment, and affirmed the charge of adultery; as to which, the Jury find that the Defendant did separate himself from the petitioner, and lived in a state of adultery,
(329) in the year 1812 or 1813, for the space of six months. And this brings forward the question, whether a

decree can be pronounced under the act of 1814, for the adultery committed before that period.

From the language used in the first and second sections of the act, it would seem to have been the intention of the Legislature to authorise divorces for causes existing when the act was passed: for the first section speaks of "a marriage heretofore contracted," and then proceeds to specify a cause of divorce coeval with the marriage, to-wit, impotency; and the second section, not less distinctly, speaks of the injury which *has been* received from either of the causes stated in the first. In the fifth section, the language is changed, and in enumerating the causes of divorce from bed and board, the law is strictly prospective, and assumes the recognised form of a Legislative act, "*futuris formam debet imponere, non Præteritis.*"—6 Bac. 370.

Before the enactment of this law, the offence charged in the petition was punishable only under the act of 1805, which imposed a fine on the party convicted; and therefore the Defendant was liable to no other punishment in 1812 or 1813, when he committed the offence; and to that extent he yet continues liable. But the Court is not called upon to superadd to this liability, a deprivation of the marital rights, and an allowance to the petitioner out of her husband's estate, under the authority of the act of 1814. But as that law increased the punishment of the offence, though it did not create its criminality, it appears to be, in relation to this case, unauthorised by the Declaration of Rights; if not by the very words, at least by their fair meaning and spirit. "Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty: Wherefore, *no ex post facto* law ought to be made."—24th sec. of the Declaration of Rights. It is true that the fact of adultery was declared criminal by the act of 1805; but to aggravate (330) the punishment of a crime, by a law posterior to its commission, is forbidden by the same reason that restrains the Legislature from converting into a crime, an act innocent when committed. Punishments are designed to suppress crimes, and the degree in which each individual is liable for specific violations of the law, is promulgated to the citizens, under a constitutional assurance, that they are irresponsible beyond the existing enactments when the crime was committed. This construction has been put upon the term *ex post facto* laws, by the Supreme Court of the United States, in the case of Calder *v.* Bull.—3 Dall. 386.—Mr. Justice Chase says, "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Mr. Justice Patterson says, in the same case, "the enhancement of a crime or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore, they may be classed together." Mr. Justice Iredell, speaking of the power of the Federal and State Legislatures, says, "they shall not pass any *ex post facto* law; or, in other words, they shall not inflict a punishment for any act, which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any offence."

Without referring to other authorities for an exposition of these terms, I think it may be taken as an incontrovertable position, that the act of 1814, so far as it is relied (331) upon to sustain this application, is substantially at variance with a most important constitutional provison, the preservation of which inviolate, is vitally connected with every principle and bulwark of civil liberty. For this reason, therefore, the petition must be dismissed.

But as another question is presented by the case, the determination of which at this time, may serve to prevent fruitless litigation, and settle the practice in other cases, the Court will give an opinion upon it. The sixth section of the act of 1814, enacts that no petition shall be sustained, unless the petitioner shall state and swear, that the facts forming the ground of the complaint, have existed to his or her knowledge, at least six months prior to the filing of the petition. The affidavit in this case, simply affirms the truth of the facts according to the best of the petitioner's knowledge and belief, and that the petition is not filed out of collusion or levity, but for the causes stated in the petition. Nor does the body of the petition state the fact in the manner required by the act. It should, however, be distinctly stated in the affidavit, that the petitioner knew of the facts charged, six months before the filing of the petition; and this, that the application may appear to the Court not dictated by passion or resentment, but an affair of deliberation.

THE GOVERNOR *v.* COL. THOMAS BELL.

From Wake.

Action of debt for 25*l.* the penalty incurred by a Colonel of the militia, for not making a return to the Brigadier-General, as directed by the act of 1806, relative to the militia. The certificate of the Adjutant-General, is evidence under that act, only of *the delinquency* of the officer. It is not evidence, that the person sued, was an officer at the time, and bound to make the return.

This was an action of debt to recover the sum of twenty-five pounds, the penalty incurred by a Colonel of the Militia, for failing to make a return to the Brigadier-(332) General. Upon the trial, the Plaintiff offered in evidence the following certificate of the Adjutant-General, to-wit:

"STATE OF NORTH-CAROLINA.

"I do hereby certify that Thomas Bell was Lieutenant-Colonel Commandant of the regiment of militia in Camden County for the year 1815: and that he the said Thomas Bell did not as such, make his military return to the Brigadier-General of the brigade in which Camden County was included for the said year, as directed by the law in such cases made and provided. Given under my hand and seal at Raleigh, this 15th day of October, A. D. 1818.

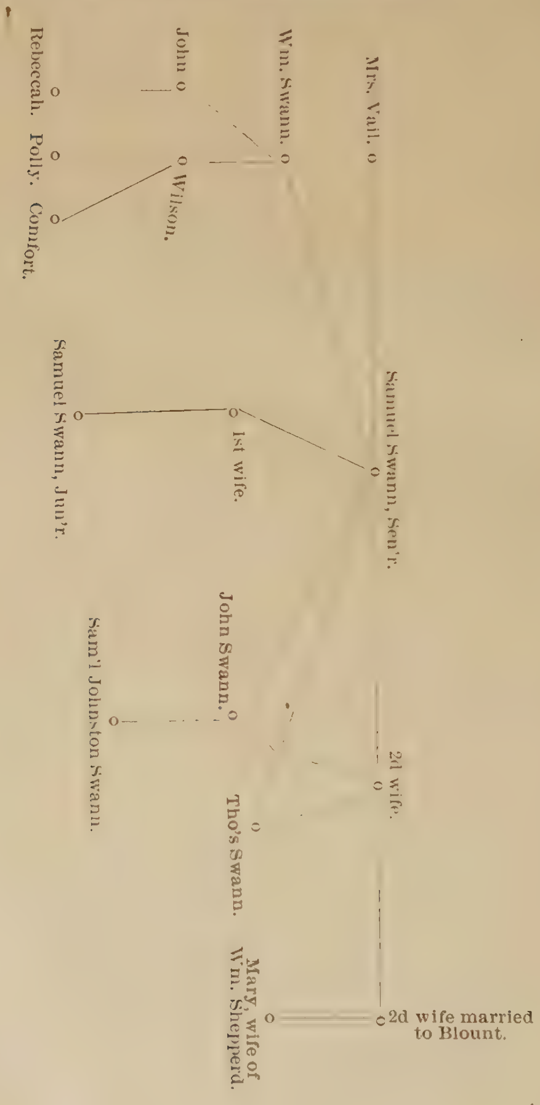
"ROBERT WILLIAMS, *Adjutant-General of the Militia of North-Carolina.* (Seal.)"

And no other evidence was offered on behalf of the Plaintiff. On behalf of the Defendant, it was insisted that under the act of 1806, relative to the militia, the certificate of the Adjutant-General was evidence only as to *the delinquency*; that it was no evidence of the Defendant's being the Lieutenant-Colonel commandant as stated in the certificate—and of this opinion was the Court; and the Plaintiff was nonsuited. A rule for a new trial was obtained, which upon argument was discharged, and the Attorney-General on behalf the Plaintiff appealed.

BY THE COURT—The act of 1806, makes the certificate of the Adjutant-General, proof of the delinquency only of the officer. To render the Defendant liable to the penalty, it is necessary further to prove that he was an officer at the time, and bound to make the return.—The nonsuit was properly awarded, and the rule for a new trial must be discharged.

(333)

JOHN DOE on the several demises of WM. B. SHEPPARD and wife *et al.* *v.* WILLIAM SHEPPARD.



Claim of the half blood in the case of a *purchased* estate.

(334) Samuel Swann, sen. devised the lands in tail to his first son Samuel Swann, jun. and to his second and third sons in succession, to-wit, John and Thomas, who were by a second wife. Samuel, the devisee, became seised in fee, by virtue of the act of 1784, ch. 22. He devised one part of the lands to John Swann, one of his brothers of the maternal half blood, and another part to Thomas Swann, another brother of the maternal half blood.

John died intestate, leaving issue, Samuel Johnston Swann, who died intestate and without issue. Thomas Swann died intestate and without issue, leaving Mary, a maternal sister of the half blood, and the said Samuel Johnston Swann, a nephew of the whole blood.

A question arose who were entitled to the lands; the kindred on the paternal side, who were further in degree; or the maternal half sister. The kindred on the paternal side are the lessors of the Plaintiff; the maternal half sister, the Defendant's wife.

The maternal half sister is entitled to the lands, for

1. Both John Swann and Thomas Swann took the lands as purchasers, and the same person who would have been the heir of John Swann, had he died without issue, is the heir of Samuel Johnston Swann.

At the common law, the principle upon which the law of collateral inheritances depends is, that upon the failure of the issue in the last proprietor, the estate shall descend to the blood of the first purchaser. And he who would have been heir to the father of the deceased, shall be heir to the son.

When a man *purchased* an estate, he took it as a *feudum novum;* descendible to his heirs general, first of the *paternal* and then of the *maternal* line. If he died without issue, or brother or sister, or the issue of such, his eldest paternal uncle would take: if there were no such uncle or the issue of such, then his paternal aunts. If there were neither nor the issue of such, then his eldest great uncle of the line of his paternal grandfather, and so on until that line be exhausted, always giving a preference to the male stocks. On the failure of blood in the line of the paternal grandfather, then the same rule was to be followed as to the paternal grandmother's line. If that fail, then the maternal grandfather's line was to inherit. On the failure of that line, then the maternal grandmother's line was to be sought for.

The issue of the eldest son of William Swann, who was the brother of Samuel Swann the elder, would be heir of Samuel Johnston Swann at common law.

2. But the act of 1784, ch. 22, has let the half blood into the inheritance, *when that half blood is in the line of inheritance.* That act does not change or alter *the stocks* or *geneological lines*, as they were known at common law. They remain the same, with the addition of the *half blood* when in *those lines.*

Mary, the wife of William Sheppard, is the heir entitled to these (335) lands under the act of 1784; because she is next in the degree of the blood of the purchasers, being a sister; and although of the *half blood,* the 3d and 4th sections of that act render her capable of inheriting.

The half blood shall not inherit when out of the common law stocks or lines, although in equal or in a nearer degree. Thus, where land descends on the side of the father to a son, who dies without issue, leaving a half blood brother on the maternal side, and an uncle or more remote relation of the whole or half blood on the paternal side; the relation next in degree on the paternal side shall inherit. 1st, because he is of the blood of the first purchaser. 2dly. the proviso to the 3d section of the act of 1784, declares that the *maternal* half blood brother shall not inherit, until such *paternal line be exhausted of the half blood*, and of course, of the whole blood. Heirs shall be sought for in the paternal line *ad infinitum*, before any of the *maternal* kindred shall inherit, however near in degree.—And *e converso*, where the lands shall descend on the maternal line.

Special verdict—"The Jury find that the premises described in the Plaintiff's declaration comprehend two tracts of land, one of 300 acres devised in fee, about the year 1733, by Thomas Swann the elder, to his eldest son Samuel: and another of 367 acres, purchased in the year 1752, from the agents of Lord Granville, by the said Samuel himself: which said two tracts are known by the name of the Elm Plantation.

"And the Jury further find, that the said Samuel Swann, being so seised of the premises, duly made and published his last will in writing, bearing date the 31st October, 1766; and therein and thereby devised the said premises to his eldest son 'Samuel, and the heirs of his body lawfully begotten, and for the want of such, to his second son John, and the heirs of his body lawfully begotten, and for the want of such, to his third son Stephen, and the heirs of his body lawfully begotten, and for the want of such to the child with which his wife was then pregnant (who was afterwards born and named Thomas) and the heirs of its body lawfully begotten;' and afterwards died without revoking or altering the said will.

"And the Jury further find, that after the death (336) of the said Samuel Swann, the elder, Samuel the devisee entered upon the premises by virtue of the said devise, and was therefore seised; and being so seised, duly made and published in writing his last will, bearing date the 24th May, 1786, and therein and thereby devised the said premises to his brother John Swann, the aforesaid second son of the said Samuel the elder, to him the said John and his heirs for ever; and afterwards died without revoking or altering the said will.

"And the Jury further find, that the said John Swann, after the death of his said brother Samuel, entered upon the premises and was thereof seised, and being so seised, afterwards, to-wit, an the 3d day of March, 1793, died intestate, leaving an only child, Samuel Johnston Swann, to whom the said premises descended, and he entered and was thereof seised.

"And the Jury further find, that the said Samuel Johnston Swann, afterwards, to-wit, on the 11th day of February, 1796, died intestate and without issue, or brothers or sisters, or the issue of such.

"And the Jury further find, that the aforesaid Samuel Swann the younger, was the only child of his father Samuel the elder, by a first wife, and that the aforesaid John Swann, Stephen Swann and Thomas Swann, were children of the said Samuel the elder by a second wife And that after the death of the said Samuel the elder, his widow intermarried with Frederick Blount, by whom she had issue a daughter, Mary, now the wife of William Sheppard of Newbern, under whom the Defendant claims the premises, and which said Mary is the nearest collateral relation of the said Samuel Johnston Swann, either paternal or maternal, the aforesaid Samuel Swann the younger, Stephen Swann and Thomas Swann the younger, being dead without issue.

"And the Jury further find, that at the time of the devise hereinbefore mentioned, from Samuel Swann the (337) younger to his brother John, the aforesaid Thomas Swann the younger was in full life.

And the jury further find, that the aforesaid Samuel Swann the younger, was at his death seized of another tract of land, which he devised to his brother, the aforesaid Thomas Swann the younger; that the value of the said tract was *l*2,000: and the value of the premises contained in the Plaintiff's declaration, was *l*6,000.

And the Jury further find, that Samuel Swann, the elder, had a brother named William Swann, and a sister, Elizabeth Vail, who are long since deceased. That the said William Swann left issue, of all whom are since dead, and of whom two only, John and Wilson have left issue. That Rebeccah, the wife of William B. Shepard, and one of the lessors of the Plaintiff, is the daughter and only child of the said John. And that Polly, the wife of Isaac Williams, and Comfort, the wife of Daniel Williams, (which said Polly and Comfort are also lessors of the Plaintiff) are the only children of the said Wilson. That Elizabeth Vail, the sister of Samuel Swann the elder, left issue Elizabeth Pemburn and Rebeccah Williamson, both of whom were in being at the death of Samuel Johnston Swann, and who, afterwards, duly conveyed and released all their right, estate and interest in the premises unto Mary, the wife of William Shepard of Newbern, under whom the Defendant claims.

The Jury further find, that the demises set forth in the Plaintiff's declaration, were executed on the day, and in the manner therein set forth; and afterwards, to wit, on the said day, by virtue of the said demises, that the said John Doe entered into the premises with the appurtenances and was thereof possessed; and that the said John Doe being so possessed, the Defendant, by command of the said William Shepard of Newbern, and Mary his wife, afterwards, to wit, on the same day, entered upon the premises with the appurtenances in and upon the possession of the said John (338) Doe thereof, and ejected him from his said farm. But whether upon the whole matter aforesaid, the said Defendant be guilty of the said trespass and ejectment complained of in the said declaration, the Jury are ignorant, and thereof pray the advice and consideration of the Court.

If it shall appear to the Court, upon the whole matter, that the lessors of the Plaintiff, or any of them, had title to the whole of the premises, at the date of their respective demises aforesaid, then the Jury say, that the Defendant is guilty of the trespass and ejectment in manner and form as the said John Doe hath complained of, and assess the damages of the said John Doe to one shilling and costs: If it shall appear to the Court, that the lessors of the Plaintiff, or any of them, had not title to the whole, but had title to any undivided part of the premises, at the date of their aforesaid demises, then the Jury find that the Defendant is guilty of the trespass and ejectment complained of, as to such part only of the premises, and not guilty of the residue, and assess the damages of the said John Doe, to six-pence and costs: And if it shall appear to the Court, that the said lessors of the Plaintiff, nor any of them, had not, at the date of the demises aforesaid, title to the whole, nor any part of the premises, then the Jury say, that the Defendant is not guilty of the trespass and ejectment, whereof the said John Doe hath complained."

The questions of law arising out of this special verdict, were argued in this Court, in the case of "Den on the demise of William B. Shepard and Wife, and others, v. Josiah Relf," in the year 1807. In the special verdict then sent up, an additional fact was inserted, to-wit, "That after the death of Samuel Johnston Swann, to-wit, on the 30th day of

November, 1803, his mother Penelope Swann, widow of John Swann, conveyed all her right, title, interest, estate, claim and demand in and to the premises, to the said Mary, wife of the said William Shepard of Newbern." The (339) arguments then made on each side, were again relied on in this case for the respective parties: and as the decision in this case, and in the one made at this term in the case of Ballard and others *v.* Hill and others," have served in a great degree to settle questions that have been long agitated, and to establish an uniform rule of descent in such cases, the arguments delivered in the case of Shepard and others *v.* Relf, are here given, to shew the grounds of the diversity of opinion which has existed upon the construction of the act of 1784, ch. 22, regulating descents among collaterals. These arguments were delivered by Peter Browne, Esquire, for the lessors of the Plaintiff, who were the heirs at common law: and by William Gaston, Esquire, for Mary, the maternal half sister, wife of William Shepard, of Newbern, under whom Relf claimed.

Browne, for the lessors of the Plaintiff. It is obvious that some part of the special verdict in this cause has been inserted with a view of raising a question, Whether John Swann took by descent or by purchase? But as I conceive that in either case the Plaintiff is entitled to recover, I shall not trouble the Court with it, conceiving it perfectly immaterial; if the Court, or any of its members, should think differently, to him or them I submit this part of the case without observation.

It is expressly stated in the special verdict in this case, that the lessors of the Plaintiff, or one of them, are, or is, the heirs or heir at common law; and, therefore, the Plaintiff must recover, unless he is barred by some act of Assembly. And, accordingly, it has been contended by the counsel for the Defendant, that certain acts of Assembly have, in this particular instance, altered the common law course of descent, and given either

1st. The inheritance, or an estate for life, to the mother of S. J. Swann, the person dying last seized; or,

2dly. The inheritance to Mary, the wife of the real (340) Defendant, who is sister of the maternal half blood, to John Swann, who was father of the said S. J. Swann.

Whether either of these defences will avail the defendant, must depend on the acts of Assembly themselves, and no assistance to either party can be drawn from the common law or books, except as to rules of construction.

The common law is a *system* of rules founded in reason, and supporting and supported by one another. It hath often happened, when any of these rules hath been altered by the Legislature. on account of a real or supposed hardship which existed under it, that the alteration itself hath occasioned more mischief and inconvenience than the original rule—that the remedy was worse than the disease—and the statute making the alteration hath been repealed and the common law restored. 1 Bl. Com. 70. When a rule of the common law hath been altered, it hath soon been discovered that it was not a detached building, nor the extreme summit of the superstructure, but a part of the foundation, or so intimately connected and interwoven with the rest of fabric, that it endangered the stability of a great part, or defaced the symmetry of the whole. Therefore the Courts have wisely said that they would make no alteration in the common law, by construction or implication, and that, whenever there was a doubt or ambiguity in a statute, they would construe it so as to suffer the rules of the common law to remain unaltered. Fitz. 233-4. If there shall, in this case, appear to be any doubt about the intention of the Legislature, the Plaintiff claims a favorable construction.

I will now proceed to a particular examination of the title which the Defendant sets up under the mother of S. J. Swann, the person dying last seised. Unless that title can be supported under § 7 of the act of April, 1784, ch. 22, it cannot, I conceive, be supported at all. It may not be improper here to cite two principal rules for the construction of statutes. "1. There are three points (says Justice (341) Blackstone) to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is how the common law stood at the making of the act; what the mischief was for which the common law did not provide: and what remedy the Legislature hath provided to cure the mischief. And it is the business of the Judges so to construe the act as to suppress the mischief and advance the remedy." 1 Bl. Com. 87. 2. The preamble is a key to open the minds of the makers of the statute and the mischiefs they intended to redress. Plow. 269.

In the case now before the Court, the mother would be excluded from the inheritance, or any portion of it, by two rules of the common law: 1st. By that rule which ordains that inheritance shall never lineally ascend. 2 Bl. Com. 208. And 2dly. By that rule which ordains that the heir must be of the blood of the first purchaser, 2 Bl. Com. 220, which she is not, it being expressly stated in the special verdict, that the lands in dispute came to her son, S. J. Swann, by descent from his father, John Swann. So stood the common law at the making of this act.

What was the mischief intended to be remedied? The Legislature itself has answered this question in the preamble to said section as follows:

> And whereas, by the law of descents, as it now stands, when any person seised of a real estate in fee simple, dies intestate, without issue, and not having any brother or sister, such estate descends to some collateral relation, notwithstanding that the intestate may have parents living, a doctrine grounded upon a maxim of law not founded in reason, and *often* iniquitous in its consequences.

Now what maxim of law is this which is not founded in reason? Clearly that which declared that the inheritance of lands shall never ascend; for in the case put in the preamble, there was no other maxim on which to ground the exclusion of both parents. In all cases where one brother purchased, and another inherited from him and then died, intestate, without issue, and not having any brother or sister, or the issue of such, one of the parents would (342) have been entitled, as the nearest heir of the blood of the first purchaser; and in all cases where a child purchased and died intestate, without issue, and not having any brother or sister, or the issue of such, the father would be entitled, as the nearest male of the paternal line. So that neither the rule of the common law, giving preference to the blood of the first purchaser, nor that giving preference to male stocks, constitute the mischief recited in the preamble; for by neither of them, in the case put in the preamble, did the estate descend to a distant collateral relation; but it did so solely in consequence of the rule that inheritances should never ascend.

But this maxim is declared to be *often* (not *always*) iniquitous in its consequences; and as it is declared not to be in every case iniquitous in its consequences, we are prepared to expect that it will not be altered in every case And in what cases should we expect that no alteration would be made? Surely in those where an alteration would take the estate of one family and give it to another: *i. e* where the lands have come to the deceased by descent. This, I take it, was the *mischief*, and, on examination, we shall find that the *remedy*, or enacting clause, applies to this mischief and no other.

> *Be it therefore enacted by the authority aforesaid*, That in case of any person dying intestate, possessed of an estate of inheritance, without leaving any issue, or not having any brother or sister, or the lawful issue of such, who shall survive, the estate of such intestate shall be vested in fee simple in his or her parent from whom the same was derived.

This evidently means the case of a gift from the parent; for the fee simple is to vest in the parent (without naming his heirs) from whom the estate was *derived* (not *inherited*,) supposing that parent to be still alive, which could not possibly be, if the estate had come to the intestate by descent from the parent. And we may here remark the care with which the Legislature have provided for continuing the estate in the family to which it originally belonged. Here they have made provision for that purpose in a case (343) where the common law did not. For if the mother had given lands in fee simple to a child, and it had died intestate, without issue, and not having brother or sister, or the issue of such, who survived, then, as that child took as a purchaser, the inheritance would, by the common law, have vested in the collateral heir on the part of the father; but by this act it returns to the mother and her family.

> Or if such estate was actually purchased or *otherwise acquired*, then the same shall be vested in the father of such intestate, if living; but if dead, then in the mother of such intestate and her heirs; and if the mother of such intestate should be dead, then in the heirs of such intestate on the part of the father; and for want of heirs on the part of the father, then to the heirs of the intestate on the part of the mother.

It will not be pretended that the present case is included under the words *actually purchased*; if, then, it is within the operation of this clause at all, it must be because the words *otherwise acquired* comprehend estates in land which have come to the intestate by inheritance. Here, then, it is all-important to attend to the true and accurate meaning of the word *acquired*. To acquire title to lands, is an expression sometimes used by good writers in such a sense as would include the getting of them by inheritance; but this, I take it, is either from inattention, or for want of some other general term more accurately to express their meaning; for the same writers, when they mean to express themselves with accuracy and precision, carefully distinguish between to *acquire* and to *inherit.* 1 Bl. Com. 458. But, in truth, *acquire* is not a technical term, and therefore its true meaning is to be searched for in eminent philological writings, and Dr. Johnson, in his Dictionary, (fol. edit.) defines it thus:

> "*To acquire, v. a.* (*acquirir* Fr. *acquiro* Lat.) To gain by one's labour or power, to obtain what is not received from nature or transmitted by inheritance."

And with this definition agree the common understanding and practice. Every one would say that Bonaparte (344) *acquired* the crown of France, but no one, that Louis XVI did—he *inherited* it.

These terms *actually purchased,* or *otherwise acquired,* are, however, extensive enough to include every other means of getting an estate in lands; and, as from the preamble, it appears that the Legislature considered the exclusion of the parents not *always* iniquitous, but in some cases right and just, in those cases they surely would continue their exclusion; and, as that cannot be in any other cases than those in which the lands came by descent to the deceased, it will follow that in cases of that description the parents are still excluded as at common law. If the Legislature had entirely abolished the maxim of the common law, *that the inheritance of land shall never ascend,* still, in cases like the present, where the lands came by descent from one parent, the other would have been excluded from the inheritance, as not being of the blood of the first purchaser. *Vide* a good argument against this title in 2 Hayw. Rep. 247.

Then let us examine the title which the Defendant sets up in right of his wife Mary, who is sister of the maternal half-blood to John Swann, from whom the lands descended to S. J. Swann, the person last seised.

If this title is good, it must be under the statute of April, 1784, chap. 22, §3.

Let us see how the common law stood at the time of making this act, so far as this title is concerned.

If John Swann took by descent, the Defendant's wife would have been excluded from the inheritance of the premises in question, because she was not of the blood of the first purchaser. 2 Bl. Com. 220.

Or, if John Swann took by purchase, she would have been excluded, because she was of the female, and not of the male, stock. 2 Bl. Com. 234.

Further, she would have been excluded, because she was only of the half-blood, even if she had been the near-
(345) est relation of the male stock, or of the blood of the first purchaser. 2 Bl Com. 224, and *seq.*

Thus stood the common law; and now for the *mischief* for which it did not provide.

As every part of the act of Assembly which could have the least bearing on this subject hath been impressed into the service of one party or the other, it may here be necessary to take a review of the whole.

§ I. Whereas it would tend to promote that equality of property which is the spirit and principle of a genuine republic, that the real estate of persons dying intestate should undergo a more general and equal distribution than has hitherto prevailed in this State.

This, which is a preamble to the three following sections, and has therefore been inserted in a separate clause by itself, has been relied upon by the counsel for the Defendant, with what propriety it is not for me to determine; but I can see none; for if the real estate of persons dying intestate was to be equally distributed among all the citizens of the State, it would be *a more general and equal distribution than has hitherto prevailed in this State:* and so would the simply abolishing the law of primogeniture occasion *a more general and equal distribution than has hitherto prevailed in this State;* and that the latter (the law of primogeniture) was the only mischief which the Legislature there had in view, will appear clearly from § 2, which regulates lineal descents and solely abolishes the right of primogeniture, and makes *a more general and equal distribution of the intestate's real estate*, by dividing it among all the sons, without admitting the daughters.

This second section contains in it no particular preamble, nor would Section 3, which regulates collateral descents, had not another mischief there come into the view of the Legislature, and which is therein set forth in a particular preamble.

III. And whereas it is almost peculiar to the law of Great Britain, and founded on principles of the feudal system, which no longer apply to that government, and can never apply in this state, that the half blood should be excluded from the inheritance.

Thus the Legislature have not left us to presume or (346) conjecture what the *mischiefs* were which they intended to remedy; but, knowing that the ingenuity of man was superior to his sagacity, and that their intention might be ingeniously and plausibly misrepresented, they have been careful to state, in the preamble in the first section, the law of primogeniture, and in the preamble to the third section, the maxim *that the half blood should be excluded from the inheritance*, to be the only mischiefs which they, in this section, intended to remedy; and, for fear that we should not make the proper use of these preambles, or *keys*, they begin the enacting clause or remedy, with a *Be it* THEREFORE *further enacted.* Wherefore was it enacted? Because the younger brothers were excluded from any portion of the inheritance by the eldest, and the half blood were excluded altogether: and this is the introduction to the only clause on which the defendant's counsel can attempt to support this title, and the enacting words of which are,

> That if any person dying intestate should, at the time of his or her death, be seized or possessed of, or have any right, title, or interest, in or to any estate or inheritance in lands or other real estate in fee simple, and without issue, such estate or inheritance shall descend to his or her brothers, and, for want of brothers, to his or her sisters, as well those of the half blood as those of the whole blood; to be divided among them equally, share and share alike, as tenants in common, and not as joint tenants; and each and every of them shall have, hold, and enjoy in their respective parts or portions such estate or inheritance as the intestate died seized and possessed of, or entitled unto.

This enacting clause may have either of two constructions put upon it. It may be construed to mean,

1st. That the lands shall descend to, and be equally divided between, all his or her brothers, and, for want of such, all his or her sisters, as well those of the half blood as those of the whole blood, without any distinction as to their being of the half blood of the first purchaser or not, or whether of the paternal or maternal line. Or it may be construed to mean,

2dly. That the lands shall descend to, and be equally (347) divided between, all his or her brothers, and, for want of such, all his or her sisters, as well those of the half blood as those of the whole blood, *they being of the blood entitled to the inheritance by the rules of the common law.*

Whichever of these constructions is put upon this clause, with regard to brothers and sisters, must be extended to more distant collateral relations, by the express words of the fourth section of the same act, which enacts

> That the same rules of descent shall be observed in lineal descendants and collaterals respectively, where the lineal descendants shall be further removed from their ancestor than grandchildren, and where the collaterals shall be further removed than the children of brothers and sisters.

The Defendant's counsel have contended for the first construction, and insisted upon the rule that this being a general expression (*to his or her brothers, &c.*) the Court cannot understand it in a restrained sense, unless they can see abundant reason to believe that the Legislature meant it so. And this I readily admit, and hope to be able to point out to the Court abundant reason for believing that the Legislature used the words *to his or her brothers, and, for want of brothers, to his or her sisters, as well those of the half blood as those of the whole blood*, in a restrained sense, to-wit, in the sense which I have stated as the second construction which may be put upon this clause.

1st. I trust it hath been satisfactorily shewn, from the preambles and preceding part of this statute, that the only mischiefs which the Legislature intended to remedy in this clause, were those which arose from the law of primogeniture, and from the rule of the common law entirely excluding half blood from the inheritance, solely on account of their being of the half blood. Now, if there is the utmost certainty that these were the only causes which induced the Legislature to enact this clause, and the only mischiefs intended to be remedied thereby, is there any rule, either of law or common sense, which would require or authorise the Court to put such a construction upon this section (348) as will do any thing more than remedy these mischiefs?

2dly. Then immediately after, in the same clause, comes this proviso:

> *Provided always*, That when the estate shall have descended on the part of the father, and the issue to whom such inheritance shall have descended shall die without issue, male or female, but leaving brothers or sisters of the paternal side of the half blood, and brothers or sisters of the maternal line also of the half blood, such brothers and sisters respectively of the paternal line shall inherit *in the same manner as brothers and sisters of the whole blood*, until such paternal line is exhausted of the half blood; and the same rule of descent and inheritance shall prevail amongst the half blood of the maternal line under similar circumstances, to the exclusion of the paternal line.

This proviso is so inaccurately drawn, that in its future construction some questions of difficulty may arise; but, at present, I shall only remark, 1st. That the Legislature, in this proviso, so far from evincing a disposition to confound together all brothers and sisters of every description, and abolish the preference which the common law gave to the blood of the first purchaser and the paternal line, (as the Defendant's counsel contend,) do expressly enact that the half blood of the first purchaser shall exclude the other half blood. Can it be believed, that they would in one breath say that there should be no preference given to blood or stock, and in the next, that there should. *Ex antecedentibus et consequentibus fiat optima interpretatio.* 2dly. When the brothers and sisters of the one-half blood are to exclude the other from the inheritance, they are to do it *in the same manner as brothers and sisters of the whole blood would:* thus referring to the rule of the common law, that brothers and sisters of the whole blood should exclude brothers and sisters of the maternal half blood from the inheritance of lands which had descended from the father to the intestate, as a law that had been long established, was well known, and still in force; for neither this act, nor any previous act of Assembly, has established any such rule, but the common (349) law had. The Defendant's counsel contend, that by the preceding part of the act, brothers and sisters of every description were placed on an equal footing with regard to inheritances of every description. Is not this directly at points with them? Does it not, as far as an immediate declaration by the Legislature of its own intention can, support the construction which I contend for. That the only effect of the preceding part of this clause and this act should be a repeal of the rules of the common law establishing the right of primogeniture, and totally excluding the half blood from the inheritance in every case.

3dly. By their construction of this third section, as I have said before, the brothers, and, for want of them, the sisters, of every description, would be equally entitled to the inheritance of all the intestate's real estate, whether inherited or acquired; and the fourth section enacts that the same rules of descent shall be observed among more distant collaterals, that is, that the nearest relations, whether of the blood of the first purchaser or not—whether of the paternal or maternal line,—and whether of the whole blood or half blood, shall inherit; but, by the seventh section of the same act, where a person dies seised and possessed of an estate of inheritance, actually purchased or otherwise acquired, intestate, and without issue, and not having brother or sister, or the issue of such, who shall survive, his father and mother being also dead, the Legislature enacts directly the reverse, and appoints that *then the inheritance shall vest in the heirs of such intestate on the part of the father, and for want of such heirs on the part of the father, then to the heirs of such intestate on the part of the mother.* Suppose the mother of S. J. Swann had died before him, and that the lands in dispute, instead of being *inherited*, had been *actually purchased or otherwise acquired* by S. J. Swann, then the present case would be exactly the one described in this seventh section, that is, of a person dying intestate, possessed of an estate of inheritance, actually purchased or otherwise acquired, without (350) leaving any issue, and not having any brother or sister, or the lawful issue of such, who have survived, his father and mother both being dead, and in such a case by the construction for which the Defendant's counsel contend of the third and fourth sections, the inheritance would descend to the Defendant's wife, being the nearest relation on the part of the mother (or grandmother) and nearer than any on the part of the father; but by the construction of the third and fourth sections for which I contend, and also by the words of the seventh section, (which are so definite and precise that they admit of no other meaning) the inheritance would descend to the lessors of the Plaintiff, who are the heirs on the part of the father, though more remote, in exclusion of the Defendant's wife, who is the maternal heir; for the heirs on the part of the mother are only to inherit *for want of heirs on the part of the father.* By their construction, the most important parts of the most important act in our statute book, and which must have been passed after much previous consideration and deliberation, are utterly inconsistent and repugnant to each other, and of course, one or the other must be rejected and can have no operation:—By my construction they are all reconciled, and each of them will have its due operation. The rule of construction is, that "one part of a statute must be so construed by another that the whole may (if possible) stand: *ut res magis valeat quam pereat.*" 1 Bl. Com. 89. If I have succeeded in shewing that the mother is not entitled in this case, her being alive can make no difference. And if the heir on the part of the father would be entitled to the inheritance if the lands had been *actually purchased or otherwise acquired* by the intestate, I think no man will be hardy enough to contend that the intestate's having *inherited* the lands from his father will *weaken* the claim of the heir on the part of the father.

4thly. The Legislature, during its then next session, in October of the same year, in ch. 10, reconsider and amend the above mentioned act, and in the second section (351) an explanation is given, not only of part of the section, but of the very sentence on which the Defendant's counsel rely. Then follows the third section, the preamble to which is,

> And whereas by the seventh section of the said act, (*the act I have been considering*) real estates actually purchased or otherwise acquired by any intestate, are to descend to the father, if living, but if dead, then to the mother of such intestate and her heirs, by which the descent may be altered by the accident of death, and the parental line, which is favoured in all other instances, may be deprived of the inheritances by such accident.

By *parental line* is here evidently meant *paternal line;* for it is it which might be deprived of the inheritance by the accident of the father dying first and that inheritance vesting in the mother of the intestate and her heirs. Then this Assembly which, if it did not wholly, must for the greater part, have consisted of the same members who constituted the Assembly that passed the act of April in the same year, ch. 22, having that act under consideration, and their attention particularly drawn to the section, the true construction of which is now disputed, declare that where real estate has been actually purchased or otherwise acquired by the intestate, the paternal line is favoured in having the inheritance in all other instances, except the one there stated; and proceed, and in the enacting part of the clause ordain, that it shall be favored thereto, and that the heirs on the part of the father, however remote, shall take the inheritance in preference to the heirs on the part of the mother, however near; for the heirs on the part of the mother are only to inherit, for want of heirs on the part of the father. This is *another* declaration of the Legislature of its intention and understanding, in as explicit terms as can be conceived, that the rule of the common law giving a preference to male stocks was, and ought to be, considered in force, any thing in the

act of April, 1784, to the contrary notwithstanding, and shews how solicitous the Legislature was to preserve it in force, and that it should apply to, and govern, every case where the lands had been purchased or otherwise
(352) acquired by the intestate.

Let me not be misrepresented or misunderstood, as contending that a statute declaring the meaning of a prior statute, can in any manner influence the construction of the prior statute with regard to cases occurring between the passing of the two statutes; all I insist on is, that statutes, like other laws, "are rules prescribed by a superior to an inferior"—that there are no particular set of words necessarily to be used in prescribing that rule; but it is sufficient if the superior makes his meaning understood by the inferior, and perfectly immaterial whether he does so at his first addressing him (as here,) or at his second addressing him (as here also:)—from the time the inferior knows the meaning and intention of the superior, he is bound to conform himself thereto. And when we come to investigate what that intent and meaning is, it is a rule, that "All acts in *pari materia* are to be taken "together, as if they were one law." Doug. 30. Here it is manifest, beyond the power of doubt or dispute, that the intent and meaning of the Legislature, on the whole, was that the heir on the part of the father, however remote, should take the inheritance in exclusion of the heir on the part of the mother, however near, and consequently the Plaintiff must recover.

It hath been contended, that the rule of the common law giving a preference to the male stocks, is founded in principles of the feudal system; and that as the Legislature has declared that these principles can never apply to this state, that rule can be no longer in force. To this argument two answers may be given.

1st. It is true that Mr. Justice Blackstone (2 Com. 235) is *inclined to think* that this rule is of feudal origin; but in the paragraph immediately preceding (page 234,) he clearly shews us that he is *inclined to think* wrong; for the three nations of antiquity, whose laws are best known, and their wisdom most admired—the Jews, the Athenians and the Romans—all had the same rule of descent, and, as
(353) the feudal system did not obtain among either of them, the rule must have had some other foundation. It is also worthy of remark, that the Athenians adopted

this rule after having had a contrary one. The reason on which this rule is founded, may be the little consideration in which women were held during the first stages of society, (Home's Sketches,) or its being supposed to answer the purposes of society better, as among the Hindoos (Asiat. Misc. for 1802,) or because, in contemplation of our law, a woman, when she is married loses her existence, as far as property is concerned, and the family is not her's, but her husband's, and, as it is the husband's family, it seems reasonable when one of the children, or the representative of one of the children, die intestate, and without issue, to look out for an heir in the same family, *i. e.* in the father's family. The father also has generally been the chief supporter of the family, and educated his children and placed them in a situation to acquire the property for which an heir is wanted. But Lork *Coke* would tell us that all this is too much curiosity: for *n'est my a disputer l'ancient principles del. ley.* Co. Lit. 11. a.

2dly. If this rule is to be altered it can only be done by the Legislature, not by the Court. And the present question is, not what the Legislature ought to have done, but what they have actually done.

It may, however, be asked, whether there are any authorities or precedents that would, under any circumstances, justify the Court in saying that the inheritance of the real estate of a person dying intestate and without issue, shall descend to some of his brothers only, when the Legislature have (in general terms) said that it shall descend to his or her brothers? There are many.

The stat. 13 Eliz. ch. 10, § 3, states, in the preamble, that long and unreasonable leases were made by deans and chapters, &c. to the utter *impoverishment of all successors,* and then enacts that *all* leases made by deans and chapters, (354) &c. for a longer term than three lives, or twenty-one years, &c. *shall be utterly void and of none effect, to all intents, constructions, and purposes;* yet the Court said that leases made by a dean and chapter, for a longer term than three lives, or twenty-one years, &c. should not be utterly void, but should be valid during the life of the dean, and void only as against his successor—3 Rep. 60; for that would be sufficient to suppress the mischief which the act was intended to remedy, namely, the impoverishment of the successor. In that act, the words were as emphatically general as any that can be imagined, and their generality was controled solely by the preamble, without any aid from any other parts of the act.

An act of attainder gave to the king *all* rights, hereditaments, &c,; but the Court said that a right of action (although, in truth, it was a right, and also an hereditament) should not be given to the king, on account of the inconvenience, but he should only have all such rights and hereditaments as might be forfeited and escheated at common law. Marquis of Winchester's case. 3. Rep. 1, *et seq.*

The cases of this description are far too numerous to be particularly stated, or even cited. I will, therefore, only refer to a few: Plow. 109, 10. Ib. 199. Ib. 203–6. Ib. 465–7. Cases in the Court of Conference, 250. "From which cases (and many others which might be cited) it appears that the Judges of the law heretofore have construed statutes quite contrary to the letter in some appearances, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, *and those which include every person in the letter, they have adjudged to reach to some persons only*, which expositions have always been founded upon the *intent of the Legislature*, which they have collected, sometimes by considering the *cause and necessity of making the act*, sometimes *by comparing one part* (355) *of the act with another*, and sometimes by foreign circumstances. So that they have ever been guided by the *intent of the Legislature.*" Plow. 205. I venture to affirm that no case ever has occurred, or ever can occur, in which the *intent of the Legislature* was or can be clearer than in the one before the Court.

I therefore conclude, that the construction of these acts for which I contend, is the true one. It is according to the intent of the Legislature; will suppress the mischief intended to be remedied, and give consistency and operation to every clause and part of them. The construction for which the Defendant's counsel contend, is not the true one, because it would abolish important rules of the common law which the Legislature have declared to be still in force; and because it would render some parts of these statutes inconsistent with, and repugnant to, other parts of them, and, consequently, the one or the other could have no operation.

The Defendant's Counsel have also relied upon an act of Assembly, passed in the year 1795, ch. 6, with a hope of supporting the title which they set up under the Defendant's wife. By this statute it is enacted,

> That from and after the passing of this act, all females shall be entitled to take by descent, equally with males, share and share alike, according to the rules of descent upon males in the before recited act, (Ap. 1784, ch. 22,) any law, usage or custom, to the contrary notwithstanding.

A very little reflection will be sufficient to shew that this is a forlorn hope.

1st. If I am right in my construction of the acts of Ap. and Oct. 1784, females were excluded by males who were of the same blood and in the same degree of proximity—the blood of the first purchaser totally excluded that which was not—and the remote heir of the male stock took in preference to the near heir of the female stock. This act, when it admits the females to inherit equally with the males, says they shall take *share and share alike*, which only applies to the cases where they were of the same blood and in (356) the same degree of proximity: if this act had abolished the preference of blood and stocks, the females, in many cases where they were excluded before, would have to take the *whole*, being nearest of kin, and not to take *share and share alike*. But it is necessary to enlarge on this point, as

2dly. They are to inherit *according to the rules of descent upon males in the before recited act.* (Ap. 1784, ch. 22.) If I am right in my construction of that act, the rule of descent upon males was, that a male who was heir on the part of the father, however remote, would take in preference to a male who was heir on the part of the mother, however near, and therefore the lessors of the Plaintiff, who are females and heirs on the part of the father, must have the inheritance in preference to the Defendant's wife, who is a female, and heir on the part of the mother (grandmother).

On the whole, I submit it to the Court, whether the rules of the common law giving a preference to the blood of the first purchaser, where the lands have come to the intestate by descent, or to the male stock, where the intestate has actually purchased or otherwise acquired them, are not still in force; and if they are, there can be no doubt but the Plaintiff must recover.

Gaston, for the Defendant. A considerable part of the special verdict in this case, is calculated and was designed to bring into view, the title by which the premises in question came to John Swann, the intestate's father, in order that it might be ascertained whether the claim of Mary Shepard, who is to be considered the real Defendant, is liable to the objection of her not being of the blood of the first purchaser. As this objection, although not now insisted on, has not been formally abandoned, it may not be amiss to submit one observation to shew that it is inapplicable. The premises were, indeed, devised to Jno. Swann by his brother, Samuel Swann the younger, to whom John was an heir, but not the sole (357) heir, for Thomas Swann the younger, another brother, was then in full life, and the devise was after the year 1784. The premises were devised in severalty. Now an estate in severalty is so different *in quality* from any joint estate, that a devise from an ancestor to *one* of his co-heirs constitutes the devisee a purchaser.—Vide Powell on Devises, 440, 441. The argument will, therefore, be conducted on the part of the Defendant, upon the ground that John Swann took the premises by purchase, and, of course, with an inheritable quality corresponding with that mode of acquisition.

The Defendant's counsel will decline, at present, the discussion of the claim of the intestate's mother. They cannot hope to add anything material to the very able and elaborate argument in its favor, to be found in the same book, and in the same case to which the Court has been referred for an argument against it.—2 Haywood's Repts. 252. Nor can they apprehend that their main defence is so feeble as to require the assistance which may be derived from this or any other claim.

The case then made by the Special Verdict is simply and briefly this: Samuel Johnston Swann being seised in fee of the premises in question, by descent from his father, died on the 11th of February, 1796, intestate, without brother or sister, or the issue of such surviving; but, leaving the Defendant, a paternal aunt of the half blood, who is the daughter of his *paternal grandmother*, and nearest collateral relation on the *part of his father*, and the lessors of the Plaintiff, who are more remote collateral relations, but on the *part of his paternal grandfather* and his heirs at common law.

On the part of the Defendant, it is insisted, that the descent in this case is regulated by statute, and that, notwithstanding the Plaintiffs are heirs at common law, the Defendant is by statute, entitled to the inheritance.

By the act of April, 1784, ch. 22, sect. 3, it is en- acted, that "if any person dying intestate, should at the time of his or her death, be seised or possessed or have any right, title, or interest, in or to any estate of inheritance in lands or other real estate in fee simple, and without issue, such estate shall descend to his or her brothers, and for want of brothers, to his or her sisters, as well those of half blood, as those of whole blood, to be divided amongst them equally, share and share alike, &c." And by the next section it is enacted, "that the same rule of descent shall be observed amongst collaterals, when they are further removed than the children of brothers and sisters," that is to say, such estate shall descend to his or her uncles, and for want of uncles, to his or her aunts, as well those of the half blood as those of the whole blood. No words can be more general or less ambiguous. It is not denied, that in their general sense, which is *of course* to be considered the legal sense, they precisely comprehend the present case. It cannot be pretended that this case is embraced by the words of any exception, proviso, or other enacting clause. In this sense too, it is worthy of remark, they of necessity exclude the idea of any distinction of stocks between father and mother, as such, or any other couple of ancestors, in regard to their lineal descendants or issue, for such a distinction can exist only in the relation of brothers and sisters, uncles and aunts, &c. *o the half blood.*

The counsel for the Plaintiff contends, that the words "his or her brothers, and for want of brothers, his or her sisters, as well those of the half blood as those of the whole blood," are not to be taken in their general sense, but as restricted by a tacit modification that these brothers or sisters be of the blood entitled to the inheritance by the rules of the common law. He supposes them, in their operation, to be subject to and controlled by two common law principles, the one requiring the heir to be of the blood of the first purchaser, the other giving a preference to the kindred of male over that of female stocks, and undertakes to point out abundant reason for the belief, that in this restricted sense they were used by the Legislature. It will be admitted by the Defendant's counsel, that general words may receive a limited or restricted interpretation, when the obvious meaning of those who use them requires such a limitation. They think, however, that this necessary restriction must first be unequivocally shewn, and then that the limitation will be co-extensive with the necessity that requires it. How far the words in question are made subject to the operation of the first of the common law principles insisted on, either by other express words in the statute, or by necessary implication, it is not now essential for them to enquire. That the words are controlled and modified by the other common law principle alleged, they deny, and will briefly examine the reasons by which such a construction is sought to be maintained.

The Plaintiff's counsel appears to place no small reliance upon the preambles to the several sections of the act, and to suppose them penned with an extraordinary and peculiar degree of accuracy and precision, to which the enacting clauses have not the slightest pretension. This supposition is indeed necessary, to warrant the use which he makes of them, which is not merely that of a key by which to unlock the intention of the Legislature, but of the cabinet itself, in which alone the intention is deposited. "The Legislature," he asserts, "have not left us to conjecture or presume what were the mischiefs which they intended to remedy, but have been careful to state, in the preamble to the 1st section, the law of primogeniture, and in the preamble to the 3d section, the maxim that the half blood should be excluded from the inheritance, as the *only* mischiefs which they in this (3d) section intended to remedy." This is not only attributing to the preambles a precision and an exclusiveness of expression which are not to be found in them, but restraining by the mere force of preambles, general enacting words which have not the least ambiguity, contrary to a well (360) established principle of construction. "The preamble of a statute is no part of the statute, but only a recital of some inconveniences which does not exclude any other for which a remedy is given by the enacting part of the statute." And therefore, "*Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.*"—8 Mod. 144. 6 Mod. 62. 4 Term Repts. 793. But supposing it correct, that the Legislature have declared these to be the *only* mischiefs which they intended to remedy, it by no means follows, that they intended to remedy them in such a manner as to suffer the issue of the mother and of the paternal grandmother of the intestate to be postponed to the collateral relations of the father and paternal grandfather. No where have they used language expressive of such an intention, but the very passages cited by the Plaintiff's counsel contain the most unequivocal evidence of a contrary intention.

The common law doctrine of descents in fee simple, did not prefer the issue of the father as such to that of the mother, but when they were different, equally and utterly excluded both in the relation of brothers and sisters of the half blood. It was the collateral relations only of the father which were preferred to those of the mother. By the enacting words of the 3d section of the act of April, 1784, the respective issue of the parents is *enabled*, in precisely the same relation, and with as little distinction as by the common law it was *excluded*. The 7th section of the same act, and the 3d of the act of October, of the same year, chapter 10th, which are the only clauses that refer to or recognize a preference of the father's kindred over that of the mother, confine that preference as it was confined at common law, to his collateral relations over those of the mother, or to cases in which the intestate *has left no brother or sister, nor the lawful issue of such.* It is correct to restrain general words in one part of an act by particular words in another, but here the attempt is to restrain general words in one clause, by the same general words in (361) another. The brothers and sisters, upon failure of whom, by the seventh section, the heirs on the part of the father are to be preferred to those on the part of the mother, are no doubt to be considered as brothers and sisters of the same description with those to whom the inheritance is by the third section, to descend, but what particular words are there in the seventh section to restrict the meaning of these terms more than in the third, where it is admitted that in the mode of expression they are general, and what authorizes the supposition, that in either case they are qualified with the condition that they must be on the side of the father? The declaration of the Legislature, that the father's relations should be preferred to those of the mother, when there is no brother or sister of the intestate surviving, so far from affording an inference that the same preference should exist when there should be brothers and sisters, leads to a conclusion directly the reverse. Supposing, therefore, this 7th section to be drawn with unusual care, and to express with the happiest perspicuity, the designs of the Legislature, instead of being an interpolation, as it has once been unjustly stigmatized, (2 Haywd. 261) " put in by some busy, conceited ignoramus, passed by the Legislature without due consideration, and which, on account of its repugnance to the rest of the act, should be considered void," what can be drawn from it by any legitimate mode of reasoning favorable to the Plaintiff's claim?

The counsel for the Plaintiff considers the preamble of the 3d section of the act of October, 1784, which he has cited without the enacting clause as if he still believed the preamble to be the *only* depository of legislative will, " as a declaration by the Legislature of its intention and understanding, in as explicit terms as can be conceived, that the rule of the common law giving a preference to male stocks was, and ought to be, considered in force," and that " it shews how solicitous the Legislature was that it should apply to and govern every case where the lands had been purchased or otherwise acquired by the intestate." (362) But if we are permitted to take the *enacting clause* into view, and suppose it to have some share in expressing the will and solicitude of the Legislature, we shall perceive the precise extent to which it was solicitous this rule should apply to and govern cases of this kind, viz. when the intestate had left no brother or sister of any description. Instead of ordaining, as the Plaintiff's counsel supposes, and asserts " that heirs on the part of the father however remote, are to take the inheritance in preference to heirs on the part of the mother however near," it declares that such heirs on the part of the father are to have the inheritance only in case of the intestate " not having any heirs of his body, *nor brother or sister or the lawful issue of such.*" And it is inconceivable that the Legislature in October 1784, composed principally as the Plaintiff's counsel suppose it to have been of the same persons who enacted the law of April, 1784, having that very statute under consideration, and their attention drawn to that section, the true construction of which is now disputed, and being particularly minded to fix the degree of preference due to male over female stocks, should, in the very act of explaining their intention and understanding and of removing all doubts thereof, declare that the heirs on the part of the father should be preferred to those on the part of the mother whenever the intestate had not left any brother or sister, if they designed the same preference to be given when he had left brothers and sisters.

Again, by the common law, the inheritance in new purchased lands and uncertain descents, as well as in descents which could actually be traced, frequently went over to a remote collateral relation although there were issue of one of the parents—although the intestate had brothers and sisters. This was the consequence of the total exclusion of the half blood, even when notoriously of the blood of the first purchaser, and resulted from the same principles of the feudal system which the Legislature declares can never apply to this state. (363) The amendment of the law in this very particular, is a part of the problem submitted by Mr. Justice Blackstone to the consideration of the Legislature. 2 Bl. Com. 236. His words deserve notice. "How far it might be desirable for the Legislature to give relief by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit where the estate notoriously descended from its own proper ancestor, and *in cases of new purchased lands and uncertain descents should never be excluded by the whole blood in a remoter degree*, or how far a private inconvenience should be submitted to rather than a long established rule should be shaken, it is not for me to determine." Our Legislature have made the determination. They have solved the problem submitted to their consideration by the learned commentator, and have not hesitated to sacrifice a portion of reverence for antiquity and the feudal system to the spirit of reason and improvement. As there is but little reason to doubt that these observations of Justice Blackstone, in a work far more popular and more generally read in America than any other written or legal science, had considerable influence in producing the alteration, it is not improper that they should have some influence in deciding its construction. The Legislature however (to adopt the style of the Plaintiff's counsel) have not left us to presume or conjecture what were their intentions in this particular. They have taken care to declare their intention to be, in all cases of purchased lands, that the half blood shall never be excluded by remoter relations of the whole blood, for that the inheritance shall descend on failure of issue to the brothers, and for want of brothers to the sisters, as well those of the half blood as those of the whole blood, and that the heirs on the part of the father are to be preferred to those on the part

of the mother, only when the intestate has not left any brother or sister or the lawful issue of such. Thus no collateral relations of the father or mother are permitted to lay
(364) claim to the inheritance while there remain in being lineal descendants either of the father or mother.

The counsel for the Plaintiff has also cited the proviso in the 3d section of the act of April, 1784, to prove that the words brothers and sisters in the preceding enacting clause, are to be taken in a restricted sense. He admits the proviso to be so inaccurately drawn, that questions of great difficulty may arise about its proper construction, but yet fancies that he discovered in it something like a recognition of the two principles of the common law for the existence and application of which he contends. 1st. That which regards the blood of the first purchaser. As this principle can have no operation prejudicial to the claim of the Defendant, she being of the blood of John Swann, the first purchaser, it will be passed over without observation. 2d. The preference of male to female stocks. This preference is supposed to be contained in the declaration, that when the estate shall have descended to the intestate on the part of his father, and the intestate shall die, leaving brothers and sisters of the half blood, both of the paternal and maternal line, those of the paternal line, *shall inherit in the same manner as brothers and sisters of the whole blood.* "Thus referring," he observes, "to the rule of the common law, that brothers and sisters of the whole blood should exclude brothers and sisters of the *maternal half blood* from the inheritance of lands *descended from the father of the intestate.*"

This intendment is so remote and concealed, that it never could have offered itself to the mind of the most critical reader, and could have been discovered only by the help of an imagination so warmed in its pursuit as to be ready to accept of any aid, and willing to overlook many incongruities. It is too refined to be entitled to much weight though it were correct, but it is plainly founded in error. For first, it supposes that the manner referred to, in which brothers and sisters of the whole blood inherit at common law, is to exclude brothers and sisters of the maternal half
(365) blood *only from the inheritance of lands descended from the father.* And also it supposes, that the exclusion is referable to a principle which distinguishes between father and mother as such, and applies therefore *only to the maternal*

and not to the paternal half blood. But it also overlooks several circumstances, which whatever obscurity there may be in some parts of the proviso, are expressed with sufficient certainty, and which are utterly repugnant to the construction into the service of which it is forced.—1st. The proviso unequivocally manifests that the Legislature were aware of the force of the general terms which they had used in the section, and that the words "brothers and sisters of the half blood," comprehended alike, and equally admitted as being precisely in the same relation, those of the maternal half blood, with those of the paternal half blood. For, in order to give a preference to the paternal half blood over the maternal half blood in descents from a father, *where they wished such a preference to exist,* they introduce an exception for the express purpose. The old maxim was supposed to be, that *exceptio probat regulam.* The Plaintiff's counsel would have it *exceptio facit regulam.*

2. Brothers and sisters of the maternal line are, by the proviso, to be excluded only by *brothers and sisters* of the paternal line, and only until the paternal line is exhausted of such brothers and sisters; and 3d. This temporary exclusion is to obtain only when the estate shall have *descended on the part of the father.* Now, by the construction of the Plaintiff's counsel, this exclusion is made to extend *to estates which have not so descended;* to obtain not only in favor of the intestate's other brothers and sisters, but *also of the collateral relations of his father;* and to continue until the line of the father is exhausted of the *most remote collateral kindred.* Indeed it would be difficult to find words less calculated to support his construction, and more at points with it than those contained in this proviso.

If, then, the Legislature have clearly announced (366) their will that a brother or sister on the part of the mother should not be excluded by, or postponed to a remote relation of the father; or, in other words, that the inheritance (with an exception in case of descents) shall descend for want of children of the intestate to all his brothers or sisters, as well those which are the issue of both parents as those which are the issue of one only, as well those of the father as those of the mother. The same rule must apply to the issue of the grand-parents, not only because the act ordains, and the Plaintiff's counsel admits, that the rule must be the same in both instances, but because the acts of Assembly no where recognize a preference, or a principle of preference, of the kindred of a male over the corresponding kindred of a female ancestor, but in express reference to father and mother. If the collateral relations of the father have preference of the collateral relations of the mother, but are postponed to the issue of the mother, the collateral relations of the paternal grandfather, claiming by analogy the like preference over the collateral relations of the paternal grandmother, must also be postponed to the issue of the grandmother.

The Plaintiff's counsel has attributed to the counsel for the Defendant, a construction for which they have never contended, or attributes to it consequences which do not flow from it, and he pronounces with more confidence than correctness, that by their interpretation, the most important parts of the most important act in our statute book, and which must have been passed after much previous deliberation, are rendered utterly inconsistent with each other, but that by his own, they are all reconciled, and each of them made to have its due operation. The counsel for the Defendant have never contended that there is no preference due to the family of the first purchaser. On the contrary, they admit such a preference is expressly given by the Legislature in certain cases, and may probably be fairly implied in others. The precise extent of this preference it was not necessary (367) for them to define, because perfectly irrelevant to their case. They have never contended that under the acts of 1784, there is no preference of male over female stocks. On the contrary, they have admitted that general words in one clause of an act, must be considered as subject to the exceptions and restrictions of particular words in another, and that in the 7th section of the act of April, 1784, there is a preference given to collaterals of the father over collaterals of the mother, which preference ought undoubtedly to be respected. They have denied, however, that a Legislative declaration that collaterals of the father shall be entitled to the inheritance when there is no brother or sister, means that they shall be entitled to it when there are brothers and sisters. They are at a loss to conceive, in what instance the slightest inconsistency, the shadow of a repugnance between the various clauses of the act can be shewn to exist under their construction. The elaborate attempt to point out what the Plaintiff's counsel deems a monstrous inconsistency, is surely not very fortunate. He supposes the lands in question to have accrued to the intestate by actual purchase, and his mother to have died before him. This would then be the case, he observes, described in the 7th section, and in which, by the Defendant's construction of the 3d and 4th sections, the land would go to the Defendant, as the nearest relation to the intestate on the *part of his mother*, and nearer than any on the part of his father, although by the very words of the 7th section, the inheritance must descend to the Plaintiffs, the heirs on the part of the father. The Defendant's counsel would indeed insist in such a case that the lands should descend to the Defendant, not however as nearest relation to the intestate on the part of his mother, but *as his heir on the part of his father*,—as sisters of the father—declared both by the 3d and 7th sections entitled to inherit from *him* (her brother) in preference to the collaterals, or the descendants of the collaterals, of either of his ancestors—as preferred to all others except his own issue. The Defendant's (368) counsel have not therefore, subjected themselves to the censure of temerity, denounced against those who contend "that the intestate's having inherited the lands from his father will *weaken* the claim of the heir on the part of the father," nor are they under the necessity of rejecting the 7th section out of the Statute in order to prevent its conflicts with the 3d and 4th. How the counsel for the Plaintiffs will allay the feuds and reconcile the contentions between the act and his exposition, is left to conjecture. Brothers and sisters on the side of the father, it is required by the exposition, shall exclude brothers and sisters on the side of the mother, from a share in the inheritance of lands purchased by the intestate, while the act ordains, that they shall all share alike in every case, except where the lands actually descended to the intestate from one of his parents. The exposition demands for the collateral relations of the father a decided precedence over the intestate's brothers and sisters on the side of the mother, but the act declares in the 3d section that brothers and sisters of every description shall be postponed to none but issue, and in the 7th refers to these very collaterals as having no pretensions except in the event of there not being any brother or sister. The exposition excludes the maternal half blood from the inheritance of lands descended from a father, forever, while the statute expressly enacts, that this exclusion shall be of a specified and limited duration. Till these jarring dissentions be removed, the counsel for the Defendant cannot apprehend that the Court will find themselves constrained to adopt this exposition, either as affording the only means of reconciliation between the discordant parts of the statute, as the true "*Concordia discordantium Canonum*," or in consequence of the abundant reasons offered to shew that it alone can effectuate the intent of the Legislature—in opposition to plain precise general words, which, so far from presenting an ambiguity, can scarcely, by the subtlest ingenuity, be tortured into a doubtful sense.

The argument on the part of the Defendant has (369) thus far been conducted principally with a view to the enquiry whether the general words of the statute of April, 1784, can be taken in the restricted sense given to them by the Plaintiff's counsel. Every part of that statute, and every other circumstance relied upon to shew that these words are to be controlled by the operation of the common law Canons of Descent has been distinctly examined. It was due to the learning and ingenuity displayed in the argument on the part of the Plaintiff, that it should be thus followed step by step. But it was not necessary for the interests of the Defendant. For the very principle upon which that argument rests, it is believed, may be conceded, and yet a short and conclusive answer rendered to the whole of it. The groundwork of the Plaintiff's argument is this—The words in the second section "the lands shall descend to and be equally divided between all the brothers, and for want of brothers all the sisters of the intestate, as well those of the half blood as those of the whole blood," must be confined in their construction to *such brothers and sisters as are of the blood entitled to the inheritance by the rule of the common law.* Be this admitted, and what follows? It follows, then, says the Plaintiff's counsel, that the brothers and sisters and the most remote collaterals on the part of the father shall be preferred to the brothers and sisters on the part of the mother, for it is a rule of the common law (2 Blackstone's Com. 234) that in collateral inheritances, the male stocks shall be preferred to the female, that is kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near. This conclusion, it might be observed, does not follow very logically from the premises.—Indeed the very opposite conclusion might be drawn with a much greater appearance of correct argumentation. The act declares that brothers of every description shall come in equally, provided only, that they be of the blood entitled by common law to the inheritance.—Now by the (370) common law, those on the side of the mother, are, in new purchased estates, of *a blood entitled to the inheritance.* Therefore, in new purchased estates, they shall be admitted equally with all others. But it is not necessary to examine very minutely whether the Plaintiff's syllogism be in approved form, or his conclusion warranted by his premises, for one of those premises is not true. There is no rule of the common law, which, the disability of half blood being removed, would give to brothers and sisters or to more remote collaterals on the side of the father, a preference over brothers and sisters on the part of the mother. The rule is supposed to be contained in the 7th and last Canon for the government of descents in fee simple, which has just been quoted from Blackstone. To this we answer, 1st. This Canon ought to be considered as having an operation only *secundum subjectam materiem,* and applying therefore to those cases only which had not been provided for by preceding Canons. To the case of a descent between brothers, it has no application, because that case had been completely and in every instance provided for and disposed of. The brother to inherit, it had been already declared, should have both the same father and the same mother with the intestate. If he had the same father and not the same mother, or the same mother and not the same father, he was equally and absolutely excluded. That the use and operation of this Canon were considered by Blackstone himself as thus limited, will appear from the words with which he introduces it. After commenting on the sixth Canon, and observing that that rule with its illustration amounts to this, that in order to keep the estate of the propositus as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the *nearest couple* of ancestors that have left descendants behind them, he adds "But here another difficulty arises. In the *second, third, fourth and every superior degree,* every man has many couples of ancestors increasing according to the distances in a geometrical progres- (371) sion upwards, the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity: in the third degree the respective issues of the four great grandsires and great grandmothers are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which therefore of THESE ANCESTORS must we first resort, in order to find out the descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks where the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness* of blood. For, the 7th and last rule or Canon is &c. &c"—2 Bl. Com. 234. It was then to answer this difficulty, and to avoid a confusion and uncertainty that might arise in other cases, but *never* in that of brothers inheriting to brothers, that this rule was adopted. Yet the Plaintiff's counsel would have it to operate upon a case to which it never had application and for which it never was designed!—But 2dly, we answer, and this is deemed conclusive; that the Canon in question cannot operate upon the case of a descent from brother to brother, because such a descent is not like that between more remote collaterals, a descent that takes effect in respect to, or in consequence of some *medius* antecessor or medium *differens* between them (to use the language of a great Judge, *Ventris* 416) but direct, immediate, and in the relation of *brother to brother.*—The words of Chf. Baron Hale, in the case of Collingwood *v.* Pace, decided in the Exchequer Chamber, are so pertinent and forceable that the Court will excuse a quotation of them somewhat at length,—"The descent from a brother to a brother (372) though it be a collateral descent, yet is it an immediate descent, and consequently unless there be disability or impediment *in one of them, no impediment in an ancestor will hinder the descent between them.*"—Ventris, 423.—That the descent is of this immediate nature, he thus proceeds to prove, "1st, in point of pleading, one brother shall derive himself heir to another without mentioning any other ancestor. 2dly, according to the computation of degrees according to the laws of England, brother and brother make one degree, and the brother is distant from his brother and sister in the first degree of consanguinity—3dly. The descent between brothers differs from all other collateral descents whatsoever, for in other descents collateral the half blood doth inherit, but in a descent between brothers, the half blood doth impede the descent, which argues that the descent is immediate. The uncle on the part of the father hath no more of the blood of the mother, than the brother of a second venter. The brother by the second venter hath the immediate blood of his father, which the uncle, viz. the father's brother, hath not, but only as they meet in the grandfather. Yet the uncle is preferred in the descent, and the reason is *because that is a mediate descent, mediante patre* but the descent to the brother must be immediate if at all, and therefore the half blood impedes it. Again it is apparent, that if in the line between brother and brother, the law took notice of the father as the medium thereof, the brother by the second venter should rather succeed the other, because he is heir to his father, *therefore in a descent between brothers, the law respects only the mediate relation of the brothers as brothers, and not in respect of their father*, although it is true the bosom or foundation of their consanguinity is in the father and mother."—*Ibid* and 424—Again, *page* 425, "The father is not such a Medium or Nexus as is looked upon by law as the means of deriving a descent between two brothers."—Unless then it can be shewn that Lord Hale is "inclined to think wrong," whenever, like Mr. Justice Blackstone, he is inclined to think differently (373) from the Plaintiff's counsel, let us ask, if the descent from brother to brother, be in law direct, and not through the intervention or in respect of their common ancestor, so that it is not affected by any impediment whatever in that ancestor, and so that the ancestor is not named in tracing the descent, not taken notice of by the law as the medium of the descent, not viewed as the Nexus between the brothers—whence it is, or can it be inferred, that upon a removal of the objection of half blood, a *frater uterinus* would not succeed to the inheritance equally with a *frater consanguineus*, in the same manner as did a *frater germanus* before the removal of that disability? "Kindred," says the 7th Canon, "derived from the blood of a male ancestor, shall be preferred to kindred derived from the blood of a female ancestor;" but a brother does not derive his legal relationship through any ancestor, he "derives himself heir without mention of any ancestor." The brother though undoubtedly heir to his father, and also to his mother, shall not succeed to a son of the same father, but with a different mother, or of the same mother, but with a different father, "because the descent from brother to brother, differs from all other collateral descents in this, that half brood is an impediment." Half blood then, whether on the one side or on the other, is a mere *personal disability.*—Remove this disability, and he then comes in as if it did not exist, not as son of the father, or as son of the mother, *but as brother.*—The most complete impediment in a father or mother, or both, such as an attainder or alienism, preventing the transmission of any inheritable blood from either, will not prevent or affect at all the descent from one son to another. Shall a partial disability then arising from the sex of the common parent, which does not prevent the transmission of some inheritable blood, produce such an effect? When a cause existing in complete force is without any legal operation, it would seem strange (374) indeed that the same cause existing in a limited degree should be attended with great legal consequences!

The rules applying to the descent of estates tail furnish an apt illustration of the doctrine in question. It is laid down in all the books, that a brother of the half blood shall succeed to the estate tail, if an heir according to the terms of the donation of the blood of the original donee. Can any decision, any dictum, any thing that looks like an authority, be brought to establish this exception to the principle, that when the father and mother are both of the blood of the original donee, a brother on the side of the mother shall be excluded by a brother or a more remote collateral on the side of the father? It is confidently believed that none such can be produced. The most diligent search has not enabled the Defendant's counsel to discover that the principle has any where been laid down in terms less general than they have stated it. Let it not be said that a case has not occurred in which it was necessary to lay down the restrictions of this general principle. If such restrictions ever had legal existence, innumerable cases must have happened to have rendered a decision upon them necessary. Estates tail owe their origin to the ambition of great families. Intermarriages among the collaterals of the same noble family have always been of daily occurrence; and some of these intermarriages must, in the nature of things, have afforded an opportunity for litigating such a case, had it been deemed worth an experiment. Let us state a case of the kind, and see how the principles which we can find will apply to it. An estate is limited to A, and to the heirs of his body. B, grandson of A, marries his cousin C, the granddaughter of A, and dies seised of the estate tail, leaving a son, D. C, the mother of D, and lineal descent of A, the original donee, marries a second husband, and dies, leaving a son by that husband, E. Then D dies seised. Does the estate tail go to E, or to a remote collateral of D on (375) the side of his father? It is believed that it will unquestionably go to E. By the terms of the case he is of the blood of A, the original donee. There is, therefore, nothing in the *forma doni* to exclude him. What then is necessary for him to shew, in order to support his claim? "In a formedon in the descender," saith my Lord Coke, "it behoveth the demandent, 1st. To make himself son and heir, or cousin and heir, to him that was last actually seised by force of the tail; and 2ndly. It behoveth that he who was actually seised be made heir in tail to the donee."—8th Repts. 88—6. E does both. He derives himself heir to D, the person last seised *as his brother*, and D, by the question, is heir in tail to the donee.

From this view, it would appear that a fallacy has insinuated itself into the argument in question at its very commencement, and pervaded it throughout. The argument takes for granted what is not law, that upon a removal of the disability attached to half blood, a brother or sister on the side of the mother, would not succeed to the inheritance in a newly purchased estate, while there were any relations on the side of the father. When such an error has obtained in the premises, it would not be extraordinary if the most logical reasoning has been unable to save the conclusion from absurdity. The Defendant's counsel do therefore contend, that if the statute contained no clause but one, abolishing the disability of half blood, their client would be entitled to the inheritance as the only sister of John Swann, the intestate's father, and ought to be considered precisely in the same light as a sister of the whole blood would have been considered previously to the abolition of that disability. If, instead of being a sister to the intestate's father and daughter of the intestate's *paternal* grandmother, she had been the sister of the intestate's mother, and daughter of the intestate's *maternal* grandfather or grandmother, or of both, then they admit the 7th canon of descent, if in force, would have had an application to her, and excluded her from the inheritance.

But the Defendant's counsel do further contend, (376) that the 7th canon, and every other rule of descents, giving a preference to male over female stocks or individuals, is utterly abolished by the act of 1795, ch. 6.—The act is in these words. "Whereas, by the before recited act, (1784, ch. 22) the inheritance of lands and other real estate in fee simple, descends to the males, in exclusion of the females, contrary to the policy of our government, Be it enacted, that from and after the passing of this act, all females shall be entitled to take by descent, equally with the males, share and share alike, according to the rules of descent upon males in the before recited act, any law, usage or custom, to the contrary notwithstanding." They believe that the act, fairly expounded, abolishes *all preference of sex*, as well between stocks as individuals, and even though its enacting words should be considered as having a direct application to individuals only, that by necessary consequence, they must produce a like effect upon stocks. The Plaintiff's counsel not denying but that the act places females on the some footing with males, as individuals, strenuously insists that it does not impair his favorite principle, the preference of males as stocks. The irrepressible attachment manifested on the part of the Plaintiff for this relict of feudalism, the steady and unshaken adherence to this object of legislative hostility and proscription, are indeed, worthy of a better cause. When the enacting words of the act of 1784, seemed to menace it with injury, every ingenious and faithful art was essayed to save it from their operation, by placing it under the protection of some clement preambles—Now that the act of 1795, preamble and all, threatens it with annihilation, a rigid, literal, and highly critical construction of the enacting words is insisted on, to evade, if possible, its destructive operation. But while we admire this ardent zeal, let not our admiration deter us from the enquiry, how far it is merited by its object. What is there in this so highly venerated tenet, "the blood derived from males is of superior dignity and worth to that derived through (377) females," which should recommend it to our feelings as men, or to our approbation as citizens? That it prevailed among our British ancestors we need not wonder, for the policy of their government, which required an aris-

tocracy to balance the conflicting claims and opposite interests of the monarch and the people, forbade a general division of the lands of an intestate among his next of kin, and the origin of their system of landed property, demanded an absolute exclusion of females from the inheritance. One of the first principles in the feudal code was "*Fæmina ab omni feudo tanquam inutilis sive inhabitis excluditur—neque enim ad munera militaria, pro quibus solis dabantur, earum opera Dominus uti potest: Nec arma tractare norunt, quod proprium est vasallorum: Neque in consilia Domini admitti mulier potest, cum quæ audit reticere nesceat.*"—Crag. de jure feud. 236. When, in the process of time, the arts of peace, agriculture and civil life, had become of value, when the merits of a vassal were no longer estimated, solely by his ability to bear arms and to keep a secret, and when, perhaps, according to the notion of the Plaintiff's counsel, females held a higher station than had been assigned to them in the infancy of society, their absolute exclusion from the feud no longer prevailed—They were permitted to succeed to the inheritance of an ancestor, when there were no male heirs. "As to the preference of males," says Sir Martin Wright, "it must be remembered that females could not, by the feudal law, succeed to a proper feud, because they were unequal to the duties or services for the sake of which it was chiefly created. And if it be farther observed, that it is *ex pacto*, or by the custom of particular countries, that they are even at this day permitted to succeed to any, it cannot seem strange that the feudal preference given to males, should prevail with us; because as Feud, Fee and Tenure are synonimies, and import but one and the same policy, such preference is plainly agreeable to the nature of tenures, and "highly reas-
(378) onable."—Introduc. to Law of Tenures, 178. The same principle of policy too, which sought to keep the fee entire, at first to maintain the military force of the kingdom, and afterwards to uphold a landed aristocracy, operated against the equal admission of females. For as they, when allowed to take, came in without any distinction of primogeniture, their indiscriminate admission would have caused a too minute subdivision of estates. At the times of which we are now considering, feuds were transmissible only to the lineal descendants of the feudatory, and it was incumbent on the claimant to the succession (as yet it is in estates tail) to trace his pedigree up to the original donee.—Sullivan

149. 2 Bl. Com. 212. To enable the feudatory's collaterals to inherit, a mode was afterwards adopted, founded on a legal fiction, of granting a *feudum novum ut feudum antiquum.* Immediately then, by a natural and almost necessary consequence, the same rules of preference were transferred to the stirpes or stocks which before had obtained amongst the individual claimants. That this is the true source of the preference of male to female stocks is evident, not only from Wright, Sullivan, and Blackstone, but from Sir Matthew Hale, and, it is believed, from every eminent British author who has written upon the subject. If Blackstone then is, in this respect, "inclined to think wrong," it is not extraordinary that our legislators, deriving their information from the same sources with himself, and probably also misled by his influence and authority, have been "inclined to think wrong," precisely in the same way. The belief can scarcely be resisted, that, in enacting the statute of 1795, they had in view the *principle itself* which preferred males to females, whether in the capacity of stocks or of individuals. It was this principle that attributes to a male, or to the descendant of a male, a superior dignity of blood, which prevented an equal division of the lands of an intestate among those equally near and dear to him. It was this principle, still permitted to exist *in a certain degree* both among individuals and stocks under the act of 1784, which (379) the Legislature deemed adverse to the policy of our government, and which they meant to abolish, with all its consequences, and in all its ramifications. It is to be hoped that, on examination, the enacting words will not prove insufficient to effectuate their intention. "*All females shall be entitled to take by descent, equally with the males, share and share alike, according to the rules of descent upon males by the before recited act.*" These general words are to be taken in a general sense, so as completely to suppress the mischief intended to be abolished, unless strong reasons are shewn for giving to them a restricted meaning. What is there to prevent the application of them to stocks, as well as to individuals? The Plaintiff's counsel relies on the words "*share and share alike,*" which prove, in his opinion, that the preference of stocks (for that of the blood of the first purchaser is not now in question) is still retained; for had it been taken away, females, in many instances, where they had been excluded before, would be entitled to *the whole* inheritance, as

nearest of kin, instead of coming in *share and share alike.* These words do indeed shew that the Legislature had in view a case in which the males and females spoken of, whether stocks or individuals, were in the same degree of propinquity. Thus much they prove, and they prove no more. Thus understood, they are as well reconciled with the Defendant's construction as with the Plaintiff's; and, unless they are thus understood, they can be reconciled with neither. According to both, the same consequences follow, and both require a rejection of this over-nice criticism. But these females are also to inherit *according to the rules of descent upon males by the act of 1784.* The Plaintiff's counsel, taking it for granted that the words "males and females" mean male individuals and female individuals, and not also male stocks and female stocks, then proceeds to shew from these words of the act, that the preference of stocks for which he contends being retained, females descended from a male (380) ancestor would be preferred to those descended from a female ancestor. But the question recurs, are these words to be thus restricted in their application? To presume that they are, and then to trace the consequences resulting from such a restricted application, is commencing with something very like a *Petito Principii.*

But even if the enacting words of this act could not have a direct and positive application to stocks, it is conceived that they must produce the same effect, indirectly and of necessary consequence, as though they had. If the view which has been taken of the origin of the principle of preference between stocks be correct, it is found to be a mere auxiliary rule of evidence, resulting altogether from considering a *feudum novum ut feudum antiquum,* and from the personal preference of male to female individuals. The fiction having been adopted, that the land had descended from an ancestor indefinitely remote, it was deemed more likely to find this ancestor in the male than in the female line, "because a preference had been given to males (by virtue of the second canon) through the whole course of lineal descents from the first purchaser to the present time."—2 Bl. Com. 235. The act of 1784, by directing how all estates of inheritance shall descend, has put an end to the feudal fiction, and the act of 1795, abolishes the personal preference. When the whole foundation of this doctrine of preference is removed, what is there to uphold the doctrine itself? When a principle, which supports and gives life to a rule, that has no substantive independent existence, is itself destroyed, by what, short of a life-giving process is the rule to be kept in being? When an ancient dogma is itself abolished, the tenets grounded upon it must fall too, unless they are preserved from a superstitious reverence for antiquity. "*Cessante causa, cessare debet effectus.*" "*Cessante ratione legis cessat et ipsa lex.*" If this be not a case in which those maxims should operate, it seems vain to look for one. Surely it is stronger than many others in which they have been allowed (381) full force. It was an established principle in the distribution of intestates' estates, that a child advanced by his father should bring that advancement into hotchpot with the other children, but not with the widow. Our act of 1784, directed that where there were more than two children, the widow should have an equal share with the children—should take a child's part, but was silent about the rule which forbade an advancement made to a child to be brought into hotchpot with her. The Judges, however, decided that it should be so brought, because the rule had ceased with its reason.—Taylor's Repts. 213. It was an undoubted rule of evidence, that a bond must be proven by the subscribing witness Yet the execution of a bond for keeping within the rules of a prison it was holden not necessary to be thus proven. The reason had ceased when the law had invested such a bond with some of the qualities of a record.—Ditto 140. It is needless to multiply instances. They clearly furnish us with this rule, that when the Legislature abolish a principle, they must be presumed to intend also the abolition of the doctrines consequent upon it; more especially should this be presumed, in a case where it is evident that the reason for repealing the principle applies with full force to a repeal of these doctrines also. No cause can be shewn why the Legislature should denounce the old maxim, preferring males to females, in its application to individuals, and approve of it in its application to stocks. If, in the one instance, it was adverse to the policy of our government, it was equally hostile in the other.

Upon the whole, it is respectfully submitted to the Court, that the Defendant is entitled to the inheritance in question, from her propinquity to the intestate, since this claim is not rebutted or impaired by those advanced in behalf of the lessors of the Plaintiff. 1st. Both parties are of the blood of the first purchaser, and therefore no preference can, on that account, be claimed by either. 2d. The principle of (382) preference set up by them as representing William Swann, brother to the intestate's grandfather, over the Defendant, sister by the maternal side to John Swann, the intestate's father, is not supported by any thing to be found in the acts of 1784. 3d. The only impediment under which the Defendant lay at common law was, the personal disability of half blood, which is effectually removed by these statutes.

And lastly, if we be mistaken in both these latter points, the act of 1795 effectually abolishes every preference of males to females, as well in the capacity of stocks as of individuals.

Browne, in reply. I am well aware of the disadvantage I labour under in the discussion of this cause. As the Plaintiff must recover by the strength of his own title, I thought myself bound to endeavor to point out a consistent, I believe the only consistent construction that can be given to the acts of April and October, 1784. I also, without the least intention of misrepresentation, stated the construction which I conceived the Defendant's counsel had contended for, and endeavored to shew, that theirs could not be the true interpretation, but that mine was. I am now very civilly told, however, that I have, "with more confidence than correctness," attributed to them a construction for which they never contended. The Defendant's counsel, after disclaiming the construction which I, erroneously, as it now seems, had attributed to them, do not attempt to substitute another, but, being in possession, content themselves with the easier task of making objections to mine. To such of these objections as I consider material, I will offer a reply.

I. *As to the title which the Defendant sets up under the mother of Samuel J. Swann.* I take it, with Lord Coke, Co. Lit. 11, a. 343, a. that a *maxim of law* and a *principle of law* are one and the same thing; and, therefore, cannot conceive where the gentleman, Mr. F. X. Martin, who argues *by consent* of the Defendant, got his impression, "that the interpolation (383) of *two principles* of the feudal system in the common law was the mischief which the Legislature had in view to remedy," (by §7, of the act of April, 1784,) as the Legislature itself has expressly declared, that the mischief, which it there intended to remedy, was grounded upon *one* *maxim* of law. The same gentleman's conjecture, that "the cases in which the expression of the Legislature, (used in that section,) that it (the exclusion of lineal ascendants) produces no mischief, must be those in which it does not operate," seems somewhat strange. Without running any great risque of being accused of conceding too much, I believe I may admit that a law has no mischievous operation where it does not operate at all: But the difficulty lies in conceiving, why the Legislature thought it necessary gravely and deliberately to inform us of that important truth.

The same gentleman, with a view of shewing that the construction of that section, contended for on behalf of the Plaintiff, would not suppress the whole mischief intended to be remedied thereby, puts four cases. Whether any of these cases are within the mischief intended to be remedied, I will not pretend to determine: But, if they are, there is nothing more common than for a Legislature to be under the necessity of passing a second, a third, or even more laws, on the same subject, because the first had not remedied the whole mischief.

The first case he puts is, where a son, after being of age, and purchasing lands in fee simple, dies intestate, without issue, or brothers or sisters, or the issue of such, and then the lands descend to his father, who enters into possession, and dies seised, intestate, without issue, or brother or sister, or the issue of such. The mischief imagined is, that, according to my construction of that section, the lands would not descend to the grandfather of the first purchaser;—which is admitted. The answer is, that, if it is a mischief that lands should not descend to an old man, who can neither use or (384) enjoy them, it would have been strange if an antediluvian Legislature, when the mischief was likely to have happened, had not provided against it; but with us, short sighted and short lived mortals, it is not surprising that it should be a *casus omissus.* All that can be said about it, is, that the Legislature has not been quite so circumspect as Holy Mother Church was, when she issued her prohibition against a man marrying his grandmother.

His second case admits of the same answer.

His third case is, "Let a widow inherit her husband's lands."—Answer. When did, or can, a widow *inherit* her husband's lands?

His fourth and last case is, "Let an uncle inherit from his nephew his purchased land."—He does not state in the exclusion of what parent the mischief consists. If it is in the exclusion of the first purchaser's father, it can in no event happen. For, if the uncle entered, then the father would inherit as heir to the uncle. Lit. § 3. If the uncle did not enter, then the father would inherit as heir to his son, according to my construction of this section. If the gentleman means the father of the uncle and grandfather of the first purchaser, he is only ringing the changes on his first case.

I will not trouble the Court any further on this head, because I trust that, in my former argument, I succeeded in shewing that neither justice nor law required, or would permit, that lands which descended from one parent to the person dying last seised, should be taken from the family of that parent, and given to the other parent and his or her family: and because the Defendant's other counsel seem to abandon this, and place their chief reliance on what they call their "main defence."

II. *The title which they set up under the sister of the maternal half blood to* JOHN SWANN, *the father of* S. J. SWANN, *the person dying last seised.*

Whoever will take the trouble of looking at the Virginia law of descents, (Rev. Code, 177, and seq.) will see that there exists no sort of analogy between it and our act of Assembly. It does, however, make a difference between cases of descent and purchase, and between bloods and stocks, and in no instance puts the half blood on an equal footing with the whole blood; and it also expressly enacts, that "in making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is, or hath been, an alien."

The gentleman who argues by consent says, that the proviso in section 3, of the act of April, 1784, has "the most correct and accurate meaning. It repels the brothers and sisters of the half blood of the parent, on the part of whom the inheritance did not descend, in one particular case *only:* when there are brothers and sisters of the half blood of both parents." Then, according to him, if lands descended from the father to A, and he die intestate and without issue, leaving a brother of the paternal half blood, and a brother of the maternal half blood, the brother of the maternal half blood would be repelled from the inheritance; but if A had left a brother of the whole blood, and a brother of the maternal half blood, the *frater uterinus* would not be repelled from the inheritance; which seems somewhat odd, and induces me to put a very probable case: Suppose A had left a brother of the whole blood, a brother of the paternal half blood, and a brother of the maternal half blood, who then should have the inheritance? All the three brothers cannot take; for, by the express words of the proviso, the brother of the paternal half blood excludes the brother of the maternal half blood. The brother of the whole blood and the brother of the paternal half blood cannot take in exclusion of the brother of the maternal half blood, if he is right, for he says, that all brothers are on an equal footing, except brothers of the paternal half blood, and brothers of (386) the maternal half blood; and, therefore, brothers of the whole blood, and brothers of the maternal half blood are on an equal footing; and if the brother of the whole blood takes, so must the brother of the maternal half blood. The brother of the paternal half blood cannot take alone; for every one, I believe, agrees that the brother of the whole blood is equally entitled with him. Here is a dilemma much worse than that of the man who had a fox, a goose, and a peck of corn, to transport across a river, and I leave the gentlemen to solve it.

I view this proviso as Lord Kenyon did a clause similarly situated; "The anxiety of some members of the house induced them to insert it after the act was first drawn; but I think the words of the enacting clause could never have been extended to the case mentioned in the proviso, if it had not been excepted."—4 Term Rep. 793. To which case I solicit the particular attention of the Court, as it hath been cited by the Defendant's counsel, and is now relied on by me.

All that this gentleman hath said about the repealing clause is arguing in a circle; and returns the question again of, Whether the two rules of the common law contended for are within the purview, or enacting part, of the act?

I now leave that gentleman to praise, with Cicero, natural law, or bewail, *alone*, the stubbornness of the ancient Barons, who would not, for the canon or civil law, exchange the common law, which is "the object of my constancy," for two reasons: 1st. Because it has secured the liberties of our ancestors longer than those of any other civilized people ever were secured; and, therefore, I believe it to be better calculated than any other system of law ever was, or probably ever will be, to preserve those of ourselves and our posterity; and 2dly. For another trifling reason—because it is the law of the land.

It is hardly necessary to say that I never have believed myself, nor vainly wished to impress a belief upon (387) others, that the preamble was the only depository of Legislative will. All I have contended for was, that the preamble was one means of finding out the intention of the Legislature: that it was "a key to open the minds of the makers of the statute and the mischiefs they intended to redress."

If the *total* exclusion of the half blood resulted from any principles of the feudal law, it was not from either of the canons of descent now contended for. It is not in conformity with the canon giving the inheritance to the blood of the first purchaser; for, suppose that the premises now in question had descended to S. J. Swann from his paternal grandfather, and that John Swann, the father of S. J. Swann, had left brothers or sisters of the paternal half blood, and brothers or sisters of the maternal half blood, both now alive, (and he has left a sister of the maternal half blood, whose claim we are now disputing,) that half blood on the part of the father of John Swann, being the children of the paternal grandfather of S. J. Swann, and his nearest relations of the blood of the first purchaser, would, by the canon securing the inheritance to the blood of the first purchaser, now take; but, by the canon excluding the half blood, they never could: the half blood on the part of the mother of John Swann (*i. e.* the present Defendant) would be equally excluded by each of these canons. Nor is it in conformity with the canon giving a preference to male stocks; for suppose that John Swann had been the purchasing ancestor, and died, leaving a brother or sister of the paternal half blood, and a brother or sister of the maternal half blood, both now alive, by the canon giving a preference to the male stocks, his brother or sister of the paternal half blood would now be entitled; but, by that excluding the half blood, they would not: the maternal half blood (*i. e.* the present Defendant) would be excluded by the first canon as long as there was any heir, however remote, on the part of John Swann's father, and by the latter canon altogether. So that generally, if not always, when the (388) canon excluding the half blood has any operation, it is to exclude a person who would be entitled to the inheritance by one or other of the canons now contended for. Therefore, the expression of the Legislature, that the exclusion of the half blood from the inheritance is "founded on principles of the feudal system which can never apply to this State," does not at all militate against the existence of the two canons now contended for; because it is not founded on *them*. Whether this rule of the common law was founded on any other principles of the feudal system, or was only meant to discourage second marriages and to promote escheats, it is not my province to determine, nor is it necessary now to inquire. It does not seem to have been fully established in Fortescue's time, (about 1450,) when the vigor of the feudal system had much declined, and which was very long after the canons now contended for had been in full force.

The seventh section of the act of April, 1784, cannot, as the Defendant's counsel contend, be considered as an exception from the third: they both constitute parts of one entire and uniform system—the third section regulating the descent among brothers and sisters, and their issue, and the seventh among more remote collaterals And it did, and still does, appear to me, that as the Legislature has expressly, in the seventh section, given a preference to the heirs on the part of the father, it might fairly be inferred that it was intended to do so in the third section; the more especially, as it is explicitly declared in the fourth section, that the same rules of descent shall be observed in the cases provided for in the third section as in the cases provided for in the seventh; and as the Legislature, in its then next session, (Ird. Rev. 529,) emphatically declares, that a preference had been given to the paternal line in *every* case except the one there specified, and then proceeds and enacts that the same line should have the preference in that case also. But the Defendant's counsel, with what propriety, or for what purposes, I am unable to perceive, sometimes call their client "heir on the (389) part of the father." Surely the same law and the same reasons which give the inheritance to the father's relations in preference to the mother's, gives it also to the grandfather's relations (the Plaintiffs) in preference to the grandmother's (the Defendant).

"The groundwork of the Plaintiff's argument," says the

Defendant's counsel, "is this—The words in the 3d section 'the lands shall descend to and be equally divided between all the brothers, and, for want of brothers, all the sisters of the intestate, as well those of the half blood as those of the whole blood,' must be confined in their construction to *such brothers and sisters as are of the blood entitled to the inheritance by the rule* (*rules*) *of the common law*." Be this admitted, and what follows? "It follows then," says the Plaintiff's counsel, "that the brothers and sisters and the most remote collaterals on the part of the father, shall be preferred to the brothers and sisters on the part of the mother; for it is a rule of the common law (2 Bl. Com. 234,) that in collateral inheritances, the male stocks shall be preferred to the female, that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near: This conclusion, it might be observed, does not follow very logically from the premises. Indeed, the very opposite conclusion might be drawn with a much greater appearance of correct argumentation. The act declares, that brothers of every description shall come in equally, provided only, that they be of the blood entitled by common law to the inheritance. Now, by the common law, those on the side of the mother are, in new purchased estates, of *a blood entitled to the inheritance*. Therefore, in new purchased estates, they shall be admitted equally with all others." It is admitted, that in this ostentatious display of correct argumentation and logical superiority, the conclusion may perhaps follow regularly enough from the premises; but it is contended that a fallacy is (390) contained in the premises, where it is supposed that "by the common law, those on the side of the mother are, in new purchased estates, of a blood entitled to the inheritance," notwithstanding there are heirs on the part of the father in existence The syllogism, however, attributed to the Plaintiff's counsel, is in fact, constructed by the Defendant's, and he may assume over it the authority of a Roman father, and treat it as he pleases. In the argument for the Plaintiff, it was taken for granted, that the common law gave to all the heirs of the blood of the father a preference over all the heirs of the blood of the mother: it was then endeavored to be shewn, that the act of Assembly had not altered this rule of the common law; and therefore the conclusion was plain, that all the heirs of the blood of the father still had a preference over all the heirs of the blood of the mother.

It now becomes necessary to attempt the proof of what was formerly taken for granted; for the Defendant's counsel say,—"There is no rule of the common law which, the disability of the half blood being removed, would give to brothers or sisters, or to more remote collaterals on the side of the father, a preference over brothers and sisters on the part of the mother."

It may be premised, that whatever tends to shew that the brother or sister of the maternal half blood must, although the disability of half blood were removed, be excluded from the inheritance where the lands descended on the part of the father to the person last seised, tends equally to show that they must be postponed in the inheritance of lands newly purchased; for, in the former case, their absolute exclusion is not a more positive rule of law than their postponement, as long as there is any heir on the part of the father, is in the latter.

The total exclusion, for several centuries last past, of the half blood on the side of both parents from all inheritances, in fee simple, may seem at first view, to forbid the hope of
arriving at any certain conclusion in this investiga-
(391) tion; but I trust, that principles and authorities will
be found sufficient to support my position.

Every writer on Feuds prove, and the Defendant's counsel admit, that the great object of the common law was "to keep the estate of the propositus as nearly as possible in the line of the purchasing ancestor." On this principle was founded the canon admitting among collateral relations, only those who were of the blood of the first purchaser, and excluding from the inheritance uncles and aunts who had none of the purchasing ancestor's blood in their veins: and surely for the same reason, brothers and sisters who had none of the purchasing ancestor's blood in their veins, must be excluded also; for the estate would be carried from the favoured line as much by the one succession as the other: if such brothers and sisters were admitted, and such uncles and aunts excluded, the law would not be a uniform system founded in reason, but a set of arbitrary rules neither reducible to, nor supported by principle.—When the line of the purchasing ancestor could not be proved, it was presumed to be the line of any male ancestor, so far as to give that a preference over the line of any female ancestor.

Blackstone, in his 7th canon (2 Bl. Com. 234,) lays it down, that "kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have, in fact, descended from a female." And immediately adds, "thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; the relations of the father's father before those of the mother's mother." It should seem, that whoever disputes the application of this authority to the present case must maintain, either that the father and mother are not ancestors; or, that a brother who is the son of the mother, but not of the father, is a relation on the father's side, or of
(392) the blood of the father.

Littleton, § 4, (Co. Lit. 12) says, "And in case where the son purchaseth land in fee simple, and dies without issue *they* of his blood of his father's side shall inherit as heirs to him, before *any* of the blood of the mother's side; but if he hath no heir on the part of his father, then the lands shall descend to the heirs on the part of the mother."—He afterwards, in § 6, lays down the rule excluding the brothers of the half blood; so that even if the argument on behalf of the Defendant as to Blackstone's authority has any force, it does not apply to Littleton's.

Gilbert, in his Law of Tenures, p. 13, (Watkin's edit.) says, "The succession was established to the descendants of the same stock *in infinitum*, but could not go to any other relations but to such as were descendants of the stock to whom the donation was given."

Whoever claims as heir by descent, must shew himself of the blood of the first purchaser. Finch 117. Hale's Hist. C. L. 239. 2 Wils. 29.

"Wherever the question is between those of the paternal and those of the maternal line, the law *always* gives the preference to the former," per Willes, J. Doug. 778. Many similar authorities might be added.

A gift in tail is to a man and the heirs of his body, and there half blood never was considered as a disability; yet when one of the issue tenant in tail in possession dies, his brother of the half blood on the part of the first donee in tail may inherit, but the brother of the half blood which is not of the first donee in tail cannot, not because he is only of the half blood, but because the half blood which he is of is not the inheritable blood, or of that line in which the heir is to be sought for. A gift in fee simple is to a man and his heirs for ever, and when tenant in fee simple dies in possession of lands, his heir is to be sought for in the line of the first purchaser, if they came to him by descent, or in the paternal line, if they were newly purchased. In both cases the inheritable quality is created by the word *heirs*, (393) and in both cases the heir is to be sought for in a particular line; and if the brothers and sisters of the half blood, not of that line, are excluded from the inheritance of estates tail where half blood occasions no disability, why should they not be excluded from, or postponed, in the inheritance of fee simple estates, although the disability of half blood were removed. The person who claims as heir must, in both cases, be of the blood of the actual or supposed first purchaser, "for without blood none can inherit." 3. Co. 41.

The inheritance of the crown of England was not, by any special law or constitution, limited to the family of William I. but he acquired an estate in fee simple in it by conquest: the half blood of that line often inherited without doubt or dispute: but no one ever conceived that the half blood not of that line could inherit:—The Black Prince married a widow who had several children by her first husband, Sir Thomas Holland, and they after the death of their half brother Richard II. who was the only child of the Black Prince, and died without issue, would have been clearly entitled to the crown, if the assertion of the Defendant's counsel is correct; yet neither they themselves nor any one else ever dreamed of their having any pretensions, although they are often mentioned (under the titles of Earl of Kent and Dukes of Surry and Exeter) in the history of the civil wars which soon followed between the rival families of York and Lancaster, and which attracted the attention of all men to the law of succession. It is highly probable that this admission of the one half blood, and exclusion of the other, was in conformity of the general law of inheritance of that day; for, in all disputes relative to the right of succession, kingdoms, fiefs, and all other indivisible inheritances, were considered as governed by the same law, not only in England, but all over Europe. Hume's Hist. vol 2, 258.

By the custom of Normandy, half blood was not (394) a disability; but the half blood on the part of the first purchaser was in due order entitled to the inheritance: the other half blood was utterly excluded. 2 Bl. Com. 232. When the present system of law was fully established, if not first introduced, into England, their King, their Parliament, their Nobles, their Judges, and their Lawyers, were all Normans, and no doubt established this Norman law. If afterwards the rule totally excluding the half blood was introduced, abolish this last rule and the former one is revived; in the same manner as when a statute altering or repealing a former statute is itself repealed, the former statute is thereby revived.

But the Defendant's counsel strenuously insist, that the descent from brother to brother is direct and immediate, without any regard to the blood of the common ancestor; and in support of this position, they have cited Lord Hale's argument in the case of Collingwood *v.* Pace as conclusive. Let us examine this doctrine.

That this was not considered to be law in Lord Coke's time is clear; for in his Commentary upon Littleton, p. 8. a. he says—"If an alien cometh into England, and hath issue two sons, those two sons are *indigenæ*, subjects born, because they are born within the realm. And yet if one of them purchase lands in fee, and dyeth without issue, his brother shall not be his heir, for there never was any inheritable blood between the father and them; and where the sons by no possibility can be heirs to the father, the one of them shall not be heir to the other." And again, "Some have holden that if a man, after he be attainted of treason or felony, have issue two sons, that one of them cnnnot be heir to the other, because they could not be heir to the father, for they never had any inheritable blood in them."

In Hobby's case, which Lord Coke cites for the last point, and which was determined in the Exchequer in the 41st of Eliz. one attainted had issue a son and a daughter, the son purchased lands in fee simple and died, and the (395) question was, whether the daughter should be his heir? It was determined, contrary to some ancient *dicta*, that she should, not however as heir on the part of the father whose blood was corrupted, nor merely as sister, but as heir on the part of the mother, who was entitled to the inheritance of these newly purchased lands in default of heirs on the part of the father. This, Lord Hale himself says, was the *principal reason* for the decision, Co. Lit. 12 a. *n.* 7. In that very case, as Rolle cites it, 2 Rolle's Rep. 93, it was agreed, that the denizen sons of an alien could not inherit to one another. Yet the Defendant's counsel say—"The most complete impediment in a father or mother, or both, such an attainder or alienage preventing the transmission of any inheritable blood from either, will not prevent or affect at all the descent from one son to another."

Cornelius Godfrey, an alien, having issue Daniel, born in Flanders, came into England, was made a denizen, had issue Cornelius, and then died. Daniel (3 Jac. I,) was naturalized by act of Parliament, purchased copy hold lands of inheritance, and then died without issue. The question was, whether his brother Cornelius should be his heir? The Court at first delivered an opinion that he could not; "for although he claimed not from his father, but from his brother, yet the common law respects the fountain from which their blood flowed." But afterwards, at another day, the Judges doubted,—"because if the act of Parliament made him inheritable, that ought to make an end to the question," and ordered the counsel to argue upon the words of the act of Parliament, which was done accordingly:—the Court then decided that the brother should inherit. 2. Rolle's Rep. 92, and *seq.* That their decision was made solely on the wording of the act of naturalization, appears from the report above cited; and further, because on a future day, during the same term, (Ib. 113,) the counsel opposed to the claim of the brother, moved the cause again, and, insisting that the act (of naturalization) did not enable the (396) brother to inherit, was proceeding to argue the question, when he was interrupted by the Court, who said, that "if the claim of the brother, who was a natural born subject, was overthrown, the claims of many others, who had been naturalized by the same Parliament, would be annulled." In Cro. Jac. 539, where the same case is reported, it is said "that the doubt *only* grew upon these words, because it is enacted (in the act of naturalization) that he shall be *heir to his ancestors, lineal or collateral,* but it is not said that they shall be heirs to him."

Several observations occur on this case: 1st. That the doctrine of the Defendant's counsel, that the descent from brother to brother is immediate, without any relation to the

blood of their common ancestor, was not then the law: for if it had, this case probably never would have been litigated, the brother dying seised, being naturalized by act of Parliament, and the one claiming as heir being a natural born subject; or, if the case had been litigated, it would have been decided on that principle of general law, without any recurrence to the act of Parliament, the construction of which was considered as so doubtful. 2ndly. The Court expressly says, "that by the common law he could not inherit; because it respected the fountain from which their blood flowed," *i. e.* their common ancestor. And 3dly. The reason which the Court gave for interrupting the counsel opposing his brother's claim:—From the moment James I. of England and VI. of Scotland united these two crowns in his own person, it was a great object with the Court to unite the two kingdoms; but that was a work of time: in the interim, however, many acts naturalizing Court favorites were passed, the nobility of the two countries intermarried, and the Judges, who held their offices during the pleasure of the King, and were notoriously under the influence of the Court, strained, or perhaps perverted, the law in favor of aliens: which last was one of the complaints in
(397) the House of Commons in the 3d year of Charles I. Hume's His. vol. VI. p. 243.

It may be proper to observe, that the disability of an alien or his children, correctly speaking, proceeds not from want of blood, for in that they are not defective, but from the place of birth. Cro. Jac. 539, or *propter defectum subjectionis,* Co. Lit. 8 a.

The short statement of the case of Collingwood *v.* Pace is, the naturalized son of an alien Scot claimed as heir to his naturalized brother the Earl of Holderness. The cause was decided about the time that our charter was granted by Charles II, and concerning it, the Judges differed in opinion, there being seven for, and three against the Claimant; so that the argument of Hale can only be considered as his own opinion, and not as the opinion of the Court: The seven, it is true, concurred in giving judgment in favor of the brother; but some of them seem to have done so for reasons different from those assigned by Hale; for in the report of that case, in 1 Lev. 59, 60, the concluding reason attributed to the Court is—"and the words of the act of parliament, which say *he shall be inheritable to any ancestor lineal or collateral,* would be in vain, if he being descended from an alien father could not have any ancestor." Thus grounding their decision on the words of the act of naturalization as the Court had done in the case of Godfrey and Dixon.

As the opinion of Lord Hale, in the case of Collingwood and Pace, was different from that of Lord Coke—of the Court in the case of Godfrey and Dixon, and in Hobby's case—of some of his brethren in that very cause,—and even of himself at another time, as above cited, and his reasons for that opinion were assigned by him merely as an individual Judge, I trust I shall not be thought guilty of very great presumption in examining the force of those reasons.

"1st." Says he, "in point of pleading, one brother shall derive himself heir to another, without mentioning any (398) other ancestor."—Suppose this to be universally true, as the Defendant's counsel would have us believe, it by no means proves, that no regard is had to the blood of the common ancestor, for the Plaintiff avers himself *brother* and *heir*, which necessarily implies that he is descended from the same father and mother; and it could answer no purpose to allege that last fact, for *expressio eorum quæ tacite insunt nihil operatur*, and therefore, the Plaintiff is not bound to do it, for *lex neminem cogit ad vana*. If the Plaintiff is not brother of the whole blood, the Defendant ought to shew it. Plow. 77. But in truth, it is only where the Plaintiff is brother, or descended from the brother of the person dying last seised, that the Plaintiff derives himself heir without mentioning any other ancestor. Co. Ent. 319, 321—which are counts in Formedon, where it cannot be pretended that the blood of the common ancestor is immaterial. But in cases, like the one now before the Court, where the Claimant is neither brother, nor representative of a brother of the person dying last seised, but claims as a more distant relation, he counts first from the common ancestor down to the person dying last seised, and then from himself up to the common ancestor, without stopping short at one of his own ancestors, and averring, that he was brother to one of those through whom the estate came from the common ancestor to the person dying last seised. Co. Ent. 317. So that if any weight is to be allowed to the mode of pleading in Formedon, it must be against the Defendant.

"2dly, says he, "According to the computation of degrees according to the laws of England, brother and brother make one degree, and the brother is distant from his brother and sister in the first degree of consanguinity."—If the word *first* is not cabalistic, there is no force in this argument. The law of England holds, that the very being of collateral consanguinity consists in a descent from one and the same common ancestor." 2 Bl. Com. 205, and therefore counts from (399) the common ancestor, as the source of their blood; and it seems very extraordinary to cite this very mode of computation to prove that the law of England has no regard to the blood of the common ancestor. The civil law, which has less regard for stocks or bloods, counts from the propositus. Whoever will take the trouble of looking at a table of descents, will immediately see that the succession to lands is not regulated by the degree of consanguinity of the Claimant, but by that of the common ancestor, *e. g.* the father's great grandson, who is of the third degree of consanguinity, succeeds before the uncle, who is of the second; because the father, whom he represents, is of the first degree of consanguinity, and the grandfather, whom the uncle represents, is of the second.—Homer himself sometimes nodded.

"3dly," says he, "the descent between brothers, differs from all other collateral descents whatsoever, for in other descents collateral, the half blood doth inherit, but in a descent between brothers, the half blood doth impede the descent," &c. —If he here means, that in collateral descents all other persons having one half the same blood with the person dying last seised (only uncles and aunts) are in due order permitted to inherit, he is certainly correct; but if he means, that in all other collateral descents, a person descended from only one common ancestor may inherit, I apprehend he is mistaken. 2 Bl. Com. 228, and Tab. 240. The total exclusion of the half blood is, however, an anomalous and positive rule, not founded upon, or consistent with the general principles regulating the law of descents, and no correct argumentation can be drawn from it either way.

Lord Hale adds another reason, which, although, the Defendant's counsel have not thought it worth citing, probably had great weight with him. "The law of England," says he, "hath been always very gentle in the construction of disability," and rather contracted than extended it." 1 Vent. 427. "And surely, if ever there was reason for a gentle construction, it concerns us to be guided by such (400) an interpretation since the union of the two kingdoms, by which many, perchance, very considerable and noble families of a Scottish extract, may be concerned in the consequence of this question, both in England and Ireland, that enjoy their inheritance in peace." Ib. 428. To this I shall only subjoin the remarks which an eminent writer, often accused of partiality for the house of Stuart, has made on a case determined a few years afterwards, in the same reign: "It is evident, that those who would apologize for the measures of the Court. must, in this case, found their arguments, not on law, but reasons of state. The Judges, therefore, who condemned the city, are inexcusable; since the sole object of their determinations must ever be the pure principles of justice and equity. But the office of Judge was, at that time, held during pleasure; and it was impossible that any cause, where the Court bent its force, could ever be carried against it." Hume's Hist. of Eng. vol. 8, 131.

Lord Hale immediately adds, "It is true, the bosom or foundation of this consanguinity is in the father and mother;" and therefore, when he afterwards says "the father is not such a medium or nexus as is looked upon by law as the means deriving a descent between two brothers," he is endeavoring to erect an edifice without a foundation—a mere castle in the air—which the Defendant's counsel now wish your honors to tenant.

Lord Hale seems to have been solely anxious, for the sake of those "very considerable and noble families," to decide against any objection arising from alienage in the parents; for he seems to admit the doctrine laid down in Hobby's cases, that the after-born sons of persons attainted cannot succeed to one another: and, in his answer to the second objection urged against the claim of the brother, he says, "It is true that their natural blood is derived from their parents, and as it is that that makes them brothers, so it is that that makes them the same blood; but yet the civil qualification (401) of their blood, which makes them inheritable one to the other, is from another fountain. (viz.) the law of the land; and the law finding them legitimate and *utrinque conjunctos sanguine parentali naturali*, and so natural brothers, and finding them transplanted into the civil rights of this kingdom, by their birth here or naturalization, which is all one, doth superinduce and close the natural consanguinity with a civil hereditary quality whereby they may inherit one the other." Thus stating them in every respect entitled to the inheritance, except that their parents were aliens, and then says he, the law, finding them so, doth superinduce and close the natural consanguinity by a civil hereditary quality, whereby they may inherit one the other. Suppose he had been asked, if the Legislature should remove the disability of half blood, could the *frater uterinus* inherit lands descended from the father? He probably would have answered,—"No; he has not the natural consanguinity on which the law could superinduce a hereditary quality." Or it must have shown the glaring deformity of his doctrine, that a brother not of the blood of the purchasing ancestor should inherit, but no other relation not of that blood should.

It might further be replied to this case, that the question before the Court is not concerning the descent from the person dying last seised to his brother or sister, but to a more distant relation.

I cannot help here expressing a wish that those who are so anxious that our Judiciary were dependent on the Legislature were informed, or would consider, how other Judiciaries have acted when they were in a dependent situation.

But if the defendant's counsel had even succeeded in establishing their position—"That there is no rule of the common law which, the disability of the half blood being removed, would give to brothers and sisters, or to more remote collaterals on the side of the father, a preference over brothers and sisters on the part of the mother," it ought not (402) in the least to influence the decision of this cause, for the Legislature, by the act of April, 1784, in my opinion, has clearly established such a preference.

In section 4 of that act, the Legislature has declared that the same rules of descent shall be observed in the cases of descents to brothers and sisters, or their children, as in cases of descent to collaterals, further removed, than the children of brothers and sisters.

And in section 7, of the same act, the Legislature has declared, that in cases where the lands have been actually purchased, or otherwise acquired, by the person dying last seised, and the descent must be to collaterals further removed than the children of brothers and sisters, the inheritance shall vest in the heirs of such intestate on the part of the father, and for want of heirs on the part of the father, then (and not till then) in the heirs of such intestate on the part of the mother.

Therefore, in cases where the lands have been actually purchased, or otherwise acquired, by the person dying last seised, and the descent must be to brothers and sisters or their children, the inheritance shall vest in the heirs of such intestate on the part of the father, and for want of heirs on the part of the father, then (and not till then) in the heirs of such intestate on the part of the mother.

Whether this argument is, or is not, in what, in the wrangling language of schools, would be called "approved form," I care not: if it has substance, and is intelligible, it will answer my purpose.

To their argument on the act of 1795, it is deemed unnecessary to offer any other answer than barely to refer to the argument formerly delivered on behalf of the Lessors of the Plaintiff. It is believed to be impossible to raise a doubt on the construction of that act, as long as words retain their present meaning.

Upon the whole, it is respectfully submitted to the Court, that the Lessors of the Plaintiff ought to recover; because, on the death of Samuel Johnston Swann, to whom (403) the premises in question descended, from his father John Swann, the mother of the said Samuel was not entitled to a life estate or the inheritance, but the heir is to be immediately sought for in the line of his said father; and because, the said John Swann leaving no other issue, the nearest relation on the part of his father (the Lessors of the Plaintiff) are, by the common law, entitled to the inheritance, and not his maternal sister of the half blood (the Defendant) who has none of his father's blood in her veins; and because it appears to have been the manifest intention of the Legislature, in the acts of April and October, 1784, to give to the heir on the part of the father, or the male stock, in every case whatsoever, a preference over the heir on the part of the mother, or the female stock; and because the act of 1795 has made no alteration in that particular.

BY THE COURT. This being an acquisition by purchase on the part of John and Thomas Swann, the wife of the Defendant is clearly entitled as heir, according to the several decisions which have been made to that effect. Judgment must be entered up accordingly.

DANIEL, Judge, (who sat for Judge Henderson :)

The two tracts of land known by the name of the Elm plantation, were devised in tail by Samuel Swann the elder, to his first, second, third and fourth sons in succession. Samuel Swann the younger, the devisee, was seised and possessed of the Elm plantation at the time entails were docked by the act of 1784, ch. 22. The other tract mentioned in the special verdict, Samuel Swann the younger, held in fee.

Samuel Swann the younger made and published his last will, on the 24th May, 1786, and therein and thereby devised the Elm plantation, to his brother, John Swann, in fee. John Swann is considered in law as *the purchaser* of this plantation, as he did not get title thereto by descent.

(404) John Swann died intestate, leaving an only child, named Samuel Johnston Swann, an only maternal half sister, by the name of Rebeccah Blount (who married the Defendant) and the lessors of the Plaintiff, who are his second cousins of the paternal line; all his brothers having died without issue.

Samuel Swann the younger, devised the other tract of land to his brother, Thomas Swann, in fee; and Thomas Swann, the devisee, having died without issue, this tract descended to his nephew, Samuel Johnston Swann. Thomas Swann is to be considered *a purchaser* of this tract of land, and, as he stood precisely in the same relation to the lessors of the Plaintiff, and to the Defendant, as John Swann the younger did, the person or persons who are entitled to the Elm plantation, will be entitled to the tract devised to him.

Samuel Johnston Swann died intestate and without issue, or brothers or sisters, or the issue of such. And the question submitted to this Court is, who are the heirs of Samuel Johnston Swann?

At the common law, the heir would be searched for among the lessors of the Plaintiff. 1st. Because they are of the paternal line and of the male stock, to-wit, the grandchildren of William Swann, who was the brother of Samuel Swann the elder, and great uncle of Samuel Johnston Swann. 2d. Because Mrs. Shepard is of the half blood and never could have inherited.

Samuel Johnston Swann dying without issue, or brother or sister, or the issue of such, leaves the case exactly in the same situation as if John and Thomas Swann, *the purchasers*, had died intestate and without issue. The same person who would have been the heir of John Swann, had he died without issue, is the heir of Samuel Johnston Swann.

The great and general principle, upon which the law of collateral inheritances depends, is this, that upon the failure of issue in the *last proprietor*, the estate shall descend to the *blood of the first purchaser*. He who would have been (405) heir *to the father of the deceased, shall also be heir to the son.* 2 Black. Com. 226.

When a man takes an estate by *purchase*, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs on the side of the father or mother; but he takes it as *feudom novum*, to be held *ut feudom antiqum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the *paternal* and then of the *maternal* line. The blood of the father is more worthy and more near in judgment of law. Coke Litt. 12 a. 12 b. Lord Coke says, every person has four immediate bloods in him, two on the part of the father, to-wit, his paternal grandfather's blood, and his paternal grandmother's blood: and two on the side of his mother, his maternal grandfather's blood, and his maternal grandmother's blood. If a man *purchase* land and die without issue, or brother or sister, or the issue of such, his eldest paternal uncle would take: If there be no paternal uncle, or the issue of such, then his paternal aunts; if there be neither, nor the issue of such, then his eldest great uncle of the line of his paternal grandfather, and so on until *that line be exhausted;* always giving a preference to the *male stocks*. On the failure of blood or kindred in the line of the paternal grandfather, then the same rule is to be followed as to the paternal grandmother's line. If that fail, then the maternal grandfather's line is to inherit. On the failure of that line, then the maternal grandmother's line is to be sought for, and it shall inherit according to the rule aforesaid. Coke Litt. 12 b.

The case does not state, which of the lessors of the Plaintiff is the issue of the eldest son of William Swann. One of them certainly is; and that person would have been the heir of Samuel Johnston Swann at common law. Let us enquire into the changes which the Legislature has made of these rules of the common law, and into the extent and reason of those changes.

In consequence of the revolution, the people of (406) this State formed a republican government, and it became necessary in defending this form of government, that the aristocratical doctrine of primogeniture, in the descent of real estates, should be exploded, the principles contained in the statute *de donis conditionalibus* be no longer enforced, joint tenancy, with its *jus accrescendi*, be abolished, and the half blood, (which had been entirely excluded) let in, when it was in *the line* of inheritance. In short, it became necessary, for the welfare of the government, that landed estates should undergo a more general and equal distribution than had hitherto prevailed. The Legislature never meant to change or alter *the stocks* or *geneological lines*, from what they were known to be at the common law. The stocks and lines remain the same, with the addition of *the half blood*, when in *those lines*, together with the ascent of real estates in certain cases.

It is in general true, that the preamble of a statute is a key stone to open the minds of the makers, as to the mischiefs intended to be remedied by the statute. But this rule must not be carried so far as to restrain the general words of an enacting clause, by the particular words of the preamble. The preamble to every section of the act of 1784, ch. 22, clearly explains the intention of the Legislature. The preamble to the 2d section, shews the will of the Legislature to promote an equality of property, by a more general and equal distribution of landed estates; or in other words, to destroy the rule of primogeniture—the second section then lets in all the sons: on failure of them and their issue, it lets in all the daughters. The preamble to the third section complains only of the exclusion of the half blood from the inheritance; the section then lets in the half blood, but does not destroy *the stocks* or *lines*, as established by the common law. There is no complaint of the common law stocks and lines. The section declares (though certainly in terms not very clear) that the old rule relative to stocks and lines shall remain; but that *the half blood* shall inherit (407) equally with the whole blood, when it is found in *those lines*, and in equal degree. And it clearly intimates by *the proviso*, that the half blood shall not inherit when out of the common law stocks or lines, although in equal or in a nearer degree. Thus when land descends on the side of the father to a son, afterwards the son dies without issue, but has a half blood brother on the *maternal* side, and an uncle or more remote relation of the whole or half blood, on the *paternal* side: the relation next in degree on the *paternal* side, shall inherit, to the exclusion of the *maternal* half brother: because, 1st. He is of the blood of the first purchaser. 2d. The proviso to the third section expressly enacts, that the *maternal* half brother shall not inherit, until such *paternal line be exhausted of the half blood*, (and of course, of the whole blood.) The *maternal* brother is not to be let into the inheritance as soon as the *paternal* line is exhausted of brothers and sisters: the act says, he shall not inherit until the *paternal line be exhausted* of the whole and half blood. Heirs shall be sought for on *that line ad infinitum*, before any of the *maternal* kindred shall inherit, no matter how near in degree. And the same rule *e converso*, when land shall descend on the *maternal* side. The paternal kindred shall be excluded as long as any whole or half blood can be found on the maternal side, let it be ever so remote.

The fourth section *extends* the rules laid down in the second section relative to lineal descendants, and, in the third section, relative to collateral relations *ad infinitum*.

That this is the most proper construction, will manifestly appear from reading the rules of the common law, and then the third and fourth sections of the act of 1784, ch. 22. This construction does not clash with any of the grand objects which were in the view of the Legislature at the time the act was passed; but runs in unison with them. It is agreeable to justice that those who are of the blood of him who has labored for and *purchased* the land, should inherit, and not a stranger. If this construction be not adopted, the (408) land might descend to a stranger in two changes; to-wit, A *purchases* land, and dies, leaving a son B. The widow marries again, and has a son C. B dies without issue, and the lands descend to C, his maternal half brother, who is not of kin to A, the *first purchaser*. Such a construction was never intended by the Legislature. The kindred of A, the first purchaser, shall be preferred, no matter how remote; otherwise industry would be cramped, and men become careless of acquiring estates.

The preamble to the fifth section complains of entails; and the section docks all entails that are in possession, and turns them into fee simple estates.

The preamble to the sixth section complains of the injustice to the family of that joint tenant who shall die first. The section abolishes the principle of survivorship, and turns all joint tenancies into tenancies in common, with one exception.

The preamble to the seventh section complains of the rule which forbids the inheritance ever to ascend. "When lands are purchased, or otherwise acquired," (but not *by descent* from a deceased parent,) "and the owner dies without issue, or brother or sister, or the issue of such," then the seventh section of the act of April, 1784, and the third section of the act of October, 1784, let in *the father* first; and, if he be dead, then the *mother for life;* and then the heirs on the part of the *father;* and, if none on his side, (*ad infinitum,*) then the heirs on the part of the *mother.*

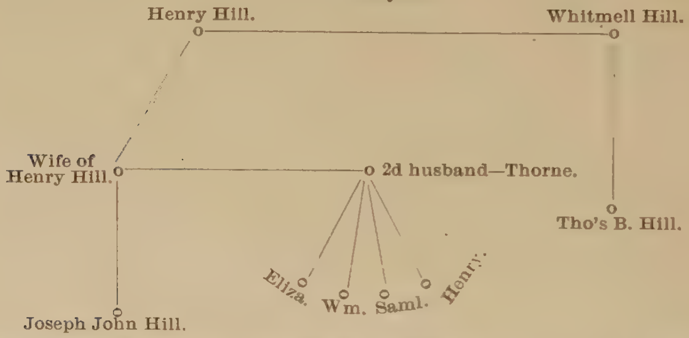
The reason given for this rule by the Legislature is, that the *paternal line* is favored *in all instances.*

Mrs. Shepard, the wife of the Defendant, is heir to the lands in dispute, because she is next in the degree *of the blood of the purchasers*, John and Thomas Swann, being a sister: and, although of the *half blood*, the third and fourth sections of the act of 1784, make her capable of inheriting. But if Mrs. Shepard should die without issue, then the next heir to these lands would not be of her father's line, (the Blount family,) because none of the blood of the purchasers (409) can be found in that line. They must be the persons who are next in degree and of *the blood* of John and Thomas Swann: 1st. of the *paternal* line, (and these would be the lessors of the Plaintiff,) and when that line is exhausted, then 2dly, the *maternal* line of John and Thomas Swann shall inherit, as they shall be nearest in degree, until it shall be exhausted; always giving preference to the *paternal* or *male stocks*, as known at the common law; and is clearly intimated by the seventh section of the act of April, 1784, and positively declared by the third section of the act of October, 1784. Let judgment be entered for the Defendant.

(410)

BENJAMIN BALLARD AND WIFE *et al.* *v.* THOMAS B. HILL'S HEIRS.

From Halifax.



Claim of the half blood in the case of a *descended* estate, prior to the act of 1808, ch. 4.

Henry Hill, being seised of the equitable estate in the lands, died intestate, leaving an only child, Joseph John Hill, upon whom the lands descended. His mother, the widow of Henry Hill, married a second husband, by whom she had issue, who were living when Joseph John Hill, their maternal brother, died intestate. Henry Hill left a brother named Whitmell Hill, who afterwards died, leaving an only son, Thomas B. Hill, his heir at law.

Upon the death of Joseph John Hill, in 1808, a question arose, whether the lands of which he died seised descended to Thomas B. Hill, his paternal cousin, and of the blood of the first purchaser; or to the maternal brothers and sisters of the said Joseph John Hill.

The Complainants are the maternal brothers and sisters—the Defendant is the paternal cousin, and the heir at common law.

Although this be a case of lands which came to the person last seised *by descent*, yet the half blood of the maternal line are entitled to the lands under the act of 1784, ch. 22.

The Complainants filed their bill in the Court of Equity for Halifax county against the Defendants, and therein charged that in the year 1789, Whitmell Hill and Henry Hill, who were brothers, purchased a tract of land lying in Bertie county, for which they each paid equal moieties of the purchase money, but the conveyance was made to Whitmell Hill alone; who agreed to convey a moiety of the (411) said land in fee simple to his brother Henry Hill. That before any conveyance was made, Henry Hill died intestate, leaving Martha, his widow, and Joseph John Hill, his only child and heir at law. That after the death of Henry Hill, Whitmell Hill had the land divided and appropriated between himself and Joseph John Hill, but died without executing to Joseph John Hill a conveyance. That he made and published in writing his last will, whereof he appointed his son Thomas B. Hill his executor, and therein and thereby directed him to convey the land so appropriated to Joseph John Hill in fee simple, whenever he should request it. That Joseph John Hill departed this life in 1808, an infant, under the age of twenty-one years, without issue, and without having applied for or received a conveyance from Thomas B. Hill.

That after the death of Henry Hill, his widow Martha, who was also the mother of Joseph John Hill, intermarried with Samuel Thorne, by whom she had issue Eliza, intermarried with Benjamin Ballard; William, Samuel and Henry Thorne were all born and living at the death of Joseph John Hill, their half brother on the mother's side; and who, since his death, had applied to Thomas B. Hill, the executor of Whitmell Hill, to make them a conveyance for the lands appropriated to Joseph John Hill; that he refused to make such conveyance, alleging that he was of the whole blood of the first purchaser, Henry Hill, and entitled to the land in exclusion of them (the Complainants.) The bill prayed for a conveyance, &c.

To this bill Thomas B Hill demurred; and the bill and demurrer were sent to this Court, and upon a consideration of the case, the demurrer was sustained and the bill dismissed.

The Complainants immediately afterwards filed a bill to review the decree; and assigned, for error in the decree, that the land mentioned in the original bill descended to them on the death of their maternal half brother, the said Joseph John Hill, and that the prayer of their bill ought to be granted; that for this error and imperfection in the (412) decree, they had brought their bill of review, and prayed that they might be relieved therein.

To this bill the Defendant pleaded the former decree, and demurred to the opening of the enrollment; and the case was sent to this Court.

The opinion of this Court upon the original bill is to be found in 2d Law Repos. 602, and the reason for it in the same book, 590.

The case was argued by Gaston, for the Complainants, and submitted on behalf of the Defendant, upon the argument made in the case of "*Shepard* v. *Relf*," and to be found in the case decided at this term, of "den on the demises of

William B. Shepard and wife and others *v.* William Shepard."

Gaston, for the Complainants.—The Complainants heretofore filed their bill of complaint to obtain from the Defendant a conveyance of lands, in which the Defendant had a legal title, and in which the Complainants alleged an equitable title. Joseph John Hill had died seised in fee of this equitable estate previous to the act of 1808. *It had descended* to him from his father. The Complainants are his maternal brothers and sisters, and claim to be his heirs at law, because he left no issue, and had no paternal brothers or sisters, or issue of such. There was a general demurrer to the bill. The question arising on the bill and demurrer was sent up to this Court, and there decided at July term, 1816, against the Complainants. Almost immediately thereafter they filed this bill of review, to which the Defendant pleads the former decree, and demurs to the opening of the enrolment. The question arising on this bill, plea and demurrer is now to be considered.

It may be safely affirmed, that the decision made, sustaining the demurrer to the original bill in this case, was opposed to the uniform construction of the acts of 1784, from their date up to the year 1807, when the case of Shepard and Relf was heard in this Court. That case was as follows:

In the year 1796, Samuel Johnston Swann died, seised of an estate which had descended from his father, and which was supposed to have come in a line of descent from remote paternal ancestors. The opinions of Johnston, Iredell, Davie, Moore, Taylor, Woods, Harris and Badger, were taken. They differed on the question, whether the mother had a life-estate; but all agreed, that the inheritance went to John Swann's maternal sister, in preference to more remote collaterals on the side of the father. A suit was brought to try the title, and it will be found reported in 2d Hayw. 115 and 246. The Court, and the counsel on both sides expressly declare the title of the father's half sister to the inheritance as indisputable. 2 Hayw. 115, 116, 246, 7, 252, 3, 4, 5.

For the first time, the doctrine under examination was advanced in 1807, when the more distant collateral relations of the paternal side to John Swann, brought suit. This case was known by the name of "Shepard and Relf."—After suit was brought, it was discovered that John Swann had acquired the lands *by purchase* and *not by descent;* so that the question now under consideration, was not involved in it. The opinion under examination needed not to have referred at all to "Shepard & Relf;" and shews that *the case itself* was not accurately known.

1st. It is an important preliminary enquiry, where is to be found the law of descents applicable to the present case? Is it partly in the old canons of descent, and partly in the acts of 1784, or is it wholly in the latter?—This question mainly depends on the enquiry, were these acts designed *to amend* certain defects in the old law, or to make new law of inheritance? There are many reasons to believe that the acts designed to make a new law. The title holds out the idea of an entire new law; "to regulate the descents of real estates:" and the title may properly indicate the scope of a law. 2 Cranch. 390. Plow. 203.—The different (414) preambles, in connexion with the history of the times, strengthens this supposition. A revolution in government had just been effected, and the conquerors were desirous to adjust the laws of real property to the principles of the new establishment, they speak of "the spirit of a genuine republic," in opposition to that of a monarchy; declare their disregard of "feudal principles," as having no application here; for their dislike of principles "tending to perpetuate wealth in families;" of such as were hostile to their notions "of natural equity;" "of maxims not founded in reason, and iniquitous in their consequences." The circumstances of the country seemed to call for a new code. Here lands were more like moveables; the objects of daily acquisition and ordinary barter; to be had by entry, subject to be sold for debts, freed from the incumbrances of dower, entails and survivorship. The spirit of the times was bold and innovating, and not very favorable to British policy or British law.

Let us also look to the phraseology of the acts. "When *any* person shall die seised of *any* estate, his estate shall descend in the *following* manner."—This is the language of laying down the rule. Every word is enacting; not one word repealing, amending or modifying.

The mode adopted in the acts is not of referring to ancient canons, repealing some, modifying others; but *the thing* itself, *the inheritance,* is taken up as being thrown into their hands by the death and intestacy of the last holder, and is by them disposed of.—By this mode, every possible case is provided for: all the old rules are necessarily brought under review, and what they like of them is taken and enacted. Thus the estate, however acquired, is given, in the first place, to all the sons, and for want of them, to daughters. The issue of deceased children are to represent their parents, and advancements are to be brought into hotchpot. Next to all brothers, then to sisters; with two modifications, one in favor of the issue of a deceased brother or sister, and the (415) other preferring those on the side of the parent from whom the land descended—then to more distant collaterals, with the same rules as to age, sex and representation. This was the whole of the original scheme. But afterwards, on suggestion of a particular inconvenience, a special provision is made for parents in the 7th section, which also affects certain cases of remote collaterals.

A complete system being thus formed, the old one is expressly and *in toto* repealed. See 17th section.—" Where a former law is inconsistent with a latter, it is necessarily repealed. But where the latter is reconcileable with the former, but legislates on the same subject, and *repeals all laws within its purview*, the former is repealed." By Chief-Justice Marshall in 2 Hayw. 228. By Judge Haywood in 1 Hayw. 245. By Supreme Court of the United States in 2 Wheaton 139.

If amendments alone had been contemplated, where the old law was approved, the Legislature would have refrained from acting. Instead of this, what they approved in it, they enact; for instance, "*that issue shall represent their ancestors.*"

The act is the most important one in our statute book, and was designed to be universally intelligible. Not one learned or technical phrase in it. How is such a design reconcileable with a silent retention of old canons of descent, known only to the learned, and not discovered for twenty-three years afterwards?

2dly. If the acts of 1784, contain the law, what does that law say?—The only enacting part which embraces this case is that of the 3d section of the act of April 1784. This, in plain words, declares, 'that when *any* person shall die seised of *any* estate of inheritance and leave no issue, such estate shall go to his brothers, &c. as well those of the half blood, as those of the whole," &c. And it contains but two excep-

tions; one, that brothers, &c. on the side of the parent
(116) from whom the lands had descended, shall be preferred to those on the other side; the other, in favour of the issue of deceased brothers or sisters.

By *the words* taken in their obvious and ordinary sense, the Complainants are clearly entitled, and,

3dly. Is there any indication of legislative intention, warranting a construction variant from the words thus understood?—"When the words of a statute, interpreted in their ordinary and obvious sense, lead to a gross violation of rights, we may hesitate in giving them such a construction; but if they produce only what we deem political inconveniences, we have no right to depart from them." 2 Cranch 390. 4 Dallas 34. (Note.) The man most conversant in legislation best knows the danger of refined and recondite interpretations.

What are the reasons assigned to require a departure from the plain words of this section? Let us examine them.

1st. It is objected, that the proviso to the third section shews, that the Legislature did not mean to place the half blood and the whole blood precisely on the same footing; for if they did, the proviso is unnecessary. To this it may be answered, that the Legislature intended the equal admission of half and whole blood to be the general rule; but as this rule was not designed to be universal, they have declared the exception. It is right to construe this exception fairly, and to observe it faithfully, but not to turn it to the destruction of the rule. It proves the general rule; it shews that the law-makers were aware that the enacting words did embrace *all* brothers, &c. of the half blood, and did apply to *descended* as well as *purchased* estates. As they meant, in the case of a descent from a parent, to give a preference to brothers, &c. on that side, over those on the others, they have said so. Had they meant any further preference, or any other ex-
(417) ception, they would have expressed it. Had it been designed to *exclude* such half blood utterly from the inheritance, nothing would have been easier than to have said so. The proviso says, brothers of one side shall be postponed to those on the other; and this is thought indicative of an intent that they never shall take, but that the lands shall rather escheat.

2d. It is further objected, that unless such a half brother be entirely excluded, a brother of the half blood on the side of the parent from whom the inheritance came, will be preferred to him; but a brother of the whole blood will not. It is denied that such a consequence flows from the construction, for which the Complainant's contend—the equal admission of the half with the whole blood, is the general rule; but the proviso stipulates an exception, by which brothers, on the side of the ancestor from whom the lands descended, shall exclude or be preferred to those not on that side: and this privilege or preference belongs to the former, whether of half or whole blood. The words are "*in the same manner* as brothers and sisters of the whole blood." The enacting clause had not only declared that brothers should inherit where there was not issue, but had raised the half to an equality with the whole blood brothers: and the proviso declares that in case of a descent from a parent, this equality belongs to those only on that side. This is a fair, natural, and obvious interpretation of the proviso, and removes the supposed necessity for a violation of the text.

The 7th section of the act of April, 1784, is referred to as furnishing an argument in favor of restricting the descent to the blood of the ancestor from whom the lands descended. This reference has been made without due reflection: for there is not a provision in this section, applicable to the case of *a descent* from a parent. So it has been decided in this Court in the case of "the Trustees of the University *v.* Holstead." 2 Law Repos. 406.

(418) The amendatory act of October, 1784, ch. 10, is also insisted on as furnishing arguments in support of this departure from the obvious sense of the words of the 3d section of the former act. This reference is believed to be equally unfortunate. The opinion under review supposes that in the 3d section it is declared as an universal and subsisting rule, that the paternal line is to be favored over the maternal. Were this supposition correct, it might have its influence to prove another and distinct point, (which, however, the Court has unanimously decided, is unfounded) that in *purchased* inheritances, blood from male stocks is preferred to that from female stocks: but it would have no bearing on the present question. The preference referred to as belonging to the paternal over the maternal line, is that existing in cases coming under the 7th section of the act of April, 1784, and such as was liable to be altered by the accident of death. By that section, a preference, where there is no issue,

nor brother nor sister, nor issue of such, and the estate has not descended, is generally given to the father and his line; but in one instance it is destroyed by the contingency of death. If the father and mother be both living, it goes to the father. If the father alone be living, he takes. If both be dead, then, in the first place, it goes to the heirs on the part of the father; but if the father be dead, and the mother be living, then it goes to the mother and her heirs. That this preference was such only as is given by the seventh section is manifest; for it does not exist where the estate has *descended;* and it is liable to be altered by the contingency of the death of one of the parents; which alteration can *never be, while there is a brother or sister.* It is, therefore, a preference limited to the cases specified in the 7th section, and, to secure it, the Legislature proceed to enact that where the estate has not descended, and the intestate has left no issue, nor brother nor sister, nor issue of such, *then* the mother shall take *for life.*

But, in an early part of the opinion, it is intimated that the Legislature have shewn by this amendatory act, that they considered some of the old common law rules of descent yet subsisting; for they admit the necessity of amending the first act, in order to let in brothers of the whole blood. If the preamble of this amendatory act be compared with the third section of the first act, it will be seen that the doubts designed to be removed were founded on over-nice verbal criticism. It was suggested, that possibly the words "as well of half as whole blood," in strict grammatical construction, applied only to the next antecedent, "sisters;" and that the admission in one case might be interpreted into an exclusion in the other case. The doubt was ridiculous enough; but from a great anxiety to free their new code from all ambiguity and cavil, they deemed it not amiss to guard against such misconstruction. Is this an admission that the doubt arose from supposing the old canons to exist? It is an admission that though the doubt was wrong, the cause from which it arose was right? Is it an admission that even an amendment was *necessary?* It was supposed *harmless,* though every intelligent man must say it was entirely *unnecessary.* (419)

The Complainants insist that this amendatory act furnishes a strong argument in favor of their doctrine. Verbal critics had been busy with the 3d section of the act of April,

1784. They had suggested doubts the most refined and far-fetched, founded on a literal interpretation of the law. It is conceded, that the interpretation of the Complainants is not only according to the letter, but is so obvious that it must be adopted, unless abundant reason be shewn to the contrary. It is known that this interpretation was, till 1807, universally adopted by Judges, Lawyers, and people. Is it possible that it had not *then* occurred to any one? Or that it did not occur to the law-makers themselves when revising this section? If it did occur, and was not the true construction, would they not, while explaining and amending the act, have guarded against it? Yet, instead thereof, (420) in act professedly explanatory and amendatory, they declare, in terms more precise, calculated to confirm the error, "that it was the intent of the Legislature to let in brothers of the half blood equally with those of the whole."

4th. Not only is there a defect of reasons to induce a departure from the obvious sense of the third section of the act of April, 1784, but there are the strongest considerations to forbid it. It cannot succeed, without an interpolation into the text of words like these, "they being of the blood preferably entitled to the inheritance by the rules of the common law." Such interpolation would not be a construction of law, but an amendment of it—not a judicial, but a legislative act. In a will, words cannot be inserted to alter the sense—even to advance what we believe equitable, and conforming to the testator's wishes. A devise, without some words of perpetuity, was but for life. Judges in England never dared to interpolate words of perpetuity: and here the evil was left for legislative remedy. A devise to A and his heirs, and if he dies without issue, to B. Our Judges have never dared to interpolate "leaving," though to make the will effectual. Have they a greater license over the universal will, which the Legislature, with all their wisdom and deliberation, have enacted for all intestates? The dangers of such a precedent are not to be foreseen and calculated.

Such an interpolation makes the Legislature guilty of the greatest absurdities. The section, so altered, would lay down a rule by which the inheritance is restricted to the blood of the purchaser, and yet a proviso is annexed to *keep out* that half blood, which the rule will not take in. The section, so altered, would lay down a rule by which the brothers of the half blood on the mother's side, in a purchased estate, shall be postponed to the brothers on the side of the father, and in an estate inherited from the father, shall not take at all. And the proviso would, in (421) that case, seem to have been prepared to guard against their taking *equally* in the *latter case only.*

The section establishes a rule, by which not only all the relations on the side of the purchasing ancestor, but that the State shall take before this interdicted class of brothers. Yet, by way of special favor, "brothers" of the favored line are to be put, before whom?—those who are utterly excluded.

Thus amended, the section compels us to give a preference in purchased estates, to all the relations of the father, over brothers on the side of the mother. Every reason resorted to, for the purposing of proving the 5th canon unrepealed, shews also that the 7th is in force. Indeed, those drawn from the amendatory act and the 7th section apply only to the former; yet it is now conclusively settled, that in a purchased estate, the brothers on the side of the mother are on an equality with those on the side of the father.

It is believed and hoped, that we shall return to the old construction unfortunately broken in upon by the former decision. All disputes, and contradictions, and uncertainties, will then be removed forever; and the law restored to what it was universally understood to be for twenty-three years after its enaction. In all estates, if there were no issue, brothers should take: but *among brothers*, in case the inheritance had descended from a parent, a preference should be given to such as were on the side of the parent. But in no instance was the claim arising from proximity, to be postponed, to let in a feudal principle, unknown to all nations where the feudal system had not prevailed, and calculated to perpetuate wealth in particular families. 2 Hayw. 253. 2 Black. Com. 220.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The claim of the Complainants arises on a descent from a maternal half brother, of lands which descended (422) from his father, or lands descending from the paternal side; and whether their claim be well founded, depends upon the true construction of the acts of April and October, 1784. The third section of the first act, without the proviso, is in these words, "that if any person dying intestate, should, at the time of his or her death, be seised or possessed of, or have any right, title or interest, in or to any estate or inheritance in lands, or other real estate in fee simple, and without issue, such estate or inheritance shall descend to his or her brothers, and for want of brothers, to his or her sisters, as well those of the half blood as those of the whole blood, to be divided among them equally, share and share alike, as tenants in common, and not as joint tenants; and such and every of them shall have, hold and enjoy, in their respective parts or portions, such estate or inheritance as the intestate died seised or possessed of or entitled unto." Were the case to depend on this enacting clause, the Complainants' right to the inheritance would be beyond controversy: for the words extend to *every person* dying seised of *any inheritance*, whether acquired by descent or purchase, whether it descended from the paternal or maternal line; and embrace both sorts of half blood, as well the maternal as the paternal. The clause must necessarily continue to govern every case that is not withdrawn from its operation by some proviso; and, therefore, it must direct the descent in this case, unless it be prevented by the proviso. The words of the proviso are, "that when the estate shall have descended on the part of the father, and the issue to whom such inheritance shall have descended, shall die without issue, male or female, but leaving brothers or sisters of the paternal side of the half blood, and brothers or sisters of the maternal line, also of the half blood, such brothers and sisters respectively of the paternal line shall inherit, in the same manner as brothers and sisters of the whole blood, until such paternal line is exhausted of the half blood: and the same rule of descent and inheritance shall prevail amongst the half blood of the maternal line, (423) under similar circumstances, to the exclusion of the paternal line." The proviso then gives a preference to the half blood of the line from which the estate descended, when the competitors for the inheritance are the half blood of that line, and the half blood of the line from which the estate did not descend. But there are no words in it, which are exclusive of the latter half blood, where there is none other in equal degree, and recommended by the reason given for the preference, to claim it from them. On the contrary, the words "until such line is exhausted of the half blood," carry with them a strong implication, that when such an event shall occur, the other line of half blood shall be taken into the inheritance. The word "until," which signifies the same as "to the time that," seems to import, that when the half blood of the favored line gives out, the other half blood shall inherit. The enacting clause has viewed with undistinguishing regard and favor the half blood of both lines; the proviso has selected a particular case, wherein the preference shall be given to one set: in all other cases, therefore, as well where the reasons of the preference have ceased to operate, as where they have never existed, the other set of half blood must be entitled.

A man having issue, and having also brothers and sisters of the half blood on the father's side, and brothers and sisters of the half blood on the mother's side, for peculiar reasons, thinks proper to devise his estate to all his brothers and sisters, as well the half blood on one side as on the other, but annexes a condition to the devise, that the paternal half blood shall enjoy the estate, until that line be exhausted: Of the *intention* of the testator in such a case, it does not seem possible to doubt. The legality of the devise is another question.

The other proviso is, "that if any brother or sister of the intestate shall have died in the life time of the intestate, leaving issue, male or female, such issue shall represent their deceased parent, and stand in the same place, he or she would have done, if living." There is nothing in this proviso, which can have any tendency to impair the right of the complainants; the only object of it being to provide for collateral descents as far as brothers' and sisters' children.

The proviso of the 2d section had made provision for lineal descendants as far as grand children; and in an order to complete the system, the words of the 4th section are, "that the same rules of descent shall be observed in lineal descendants and collaterals respectively, where the lineal descendants shall be further removed from their ancestor than grandchildren, and where the collaterals shall be further removed than the children of brothers and sisters." What is meant by "the same rules of descent?" Clearly the rules established by the preceding sections, one of which is, that where there are two sets of half blood, the set of that line from which the estate descended, shall be preferred to the line from which it did not descend: Consequently, uncles and aunts, great uncles and great aunts, &c. of the line from which the estate descended, shall exclude uncles and aunts, great uncles and great aunts, &c. of the line from which it did not descend. In other words, where those who claim the inheritance are in equal degree, or represent those who were, the acquiring line shall be preferred. Where the claimants are not in equal degree, the proximity of degree shall decide the right to the inheritance. This appears to the Court to be the true interpretation of these sections of the act of 1784, and to arise naturally from the words, as well as being consonant to the views of the Legislature, and to the spirit in which the act was framed. To exclude the maternal half blood for the sake of a remote collateral, or to suffer the land to escheat rather than permit the half blood to inherit, does not seem to accord with the sentiment expressed in the preamble to the 3d section: "And whereas it is almost peculiar to the law of Great Britain, and founded in principles of (425) the feudal system, which no longer apply in that government, and never can in this State, that the half blood should be excluded from the inheritance, &c."

It is true, that the law of England gives a preference to the male stock; and there is a partial recognition of the same principle, in the 7th section of the act of April, 1784, amended by the act of October, 1784; which provides, that in case of the death of any person intestate, leaving any real estate actually purchased or otherwise acquired, and not having any heirs of his body, nor any brother or sister, or the lawful issue of such, then such estate shall be vested in the father of the intestate, if living, but if dead, then in the mother for life, then in the heirs of such intestate on the part of the father, and for want of heirs on the part of the father, then in the heirs of the intestate on the part of the mother forever."

It is to be observed on this section, that the father is called in, only upon the son's dying without lineal heirs, and without brothers or sisters, or the issue of such. The preference of the male stock has been confined strictly to the cases enumerated in the 7th section, and its amendment, to-wit, to cases of estates purchased by the intestate. And on this point, the decisions have been uniform, allowing the half blood to inherit, when the land was purchased, and giving them the preference to the father and the male stock.

A section inserted for the purpose of giving a preference to the male line, amended to prevent that preference from being interrupted by the accident of death, is yet so restricted in its terms, and so modified by judicial exposition, admitted to be just, that the favoured stock is called to the inheritance only after the failure of issue in the intestate, and the failure of brothers and sisters of every description, maternal as well as paternal half blood. It appears to the Court, that every reason for thus confining and limiting the preference of the male line under this clause, applies with increased strength to prove, that the preference ought to be strictly confined under the third section, to the half blood of the (426) acquiring line: that they, and they only, shall exclude the half blood of the non-acquiring line. A consistent meaning will be thus given to the 3d clause, to the proviso, and its extension by the 4th section, which would then read, "Where any person shall die intestate, without issue, and without brother or sister, or the issue of such, leaving uncles or aunts of the line from which the estate descended, and uncles or aunts of the line from which the estate did not descend, the former uncles or aunts shall exclude the latter."

There is also a declaration in the 3d section of the act of October, 1784, "That the paternal line is favored in all other instances," and it proceeds to guard against the estate being transferred to the maternal line, by the death of the father before the mother of the intestate, which would have happened in consequence of the phraseology of the 7th section. It is apprehended that this declaration relates only to the instances in which the paternal line is favoured in the 7th section; to-wit, that in purchased estates, it shall ascend to the father, if living, but if he be dead, and the mother likewise, that it shall descend to the paternal heirs, and continue in that line as long as there are any heirs. So that it is favoured in all cases of purchased estates, except where the father be dead and the mother be alive: in which case, the heritable line was diverted from the paternal. When the Legislature were about to remedy this only case in which the paternal line was not favoured in the 7th section, with respect to purchased estates, it was natural to advert to the other cases where it was favoured; and in relation to this provision, it was favoured "in all other instances." In no other sense can the declaration be considered correct; for no preference is given to it in any other part of the act, except in entitling males before females. It is not preferred in descents; it is not preferred where the estate descends from the

maternal line; it cannot be preferred by force of the
(427) seventh canon of descents, for that plainly comes
within the purview of the 7th section, and the amendatory law, and, as such, "is repealed and made void."

The sixth canon of descents, excluding the half blood, was unquestionably repealed by the third section of the act of April, 1784, for the same reason: from which time the half blood became entitled. In October, 1784, the Legislature say, "that doubts have been entertained whether brothers of the half blood shall be entitled to succeed to the inheritance in the same manner as sisters do, where there is no brother, nor the issue of any such;" and they proceed to declare that it was their intention, in the third section of the act of April, 1784, to let in brothers of the half blood, equally with brothers of the whole blood, &c. This act was passed from abundant caution, and to guard against a construction in opposition to the declared will of the Legislature, and one which it is believed would not be recognized by a Court of Justice; since the rule of law is, that relation shall be had to the last antecedent, unless it obstruct the sense. The preamble to the third section expresses the intention to admit the half blood; and the construction of the words, unless much refined upon, conveys that intention. The Legislature say that doubts have been suggested: to prevent them in future, they declare what their original intention was, and change the language of the third section.

So far as the Legislature have declared a preference for the line of the purchasing ancestor, or the male stock, the Court is bound to execute their will; but it does not feel bound by any considerations of expediency or justice to preserve a preference, where it is not clearly to be collected from the law. The principles are peculiar to the laws of England, and others derived from the feudal system, and were unknown to the enlightened republics of antiquity. The system is purely artificial, and, in some respects, repugnant to our notions and the obligations of duty. So far as natural reason suggests any thing on the subject, a law regu-
(428) lating the descent of estates should be founded on
the presumed will of the deceased; and regulate the succession in such a manner as he, probably, would have done, under the united dictates of duty and inclination. The strongest affection is between parents and children; and the next, the love between brethren, arising from their relation

to the same common stock, heightened by youthful association, and the likeness of years and education.

The last owner of an estate is as completely so as any former one; and it is quite as reasonable to consult his presumed inclination as that of a remote ancestor. It is not probable that he would prefer a distant collateral, because of the male stock, to his maternal brothers; nor is it certain that duty would require him to do it, because the remote relation was of the acquiring blood. The law relative to the distribution of personal property has excluded all these principles, and its justice is generally approved.

For these reasons it is the unanimous opinion of the Court that the demurrer be overruled and the bill sustained.*

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*Taylor, Hall, and Murphy, (who sat for Judge Henderson,) composed the Court. Judge Henderson had been of counsel in this case, and gave no opinion in relation to the judgment. His opinion had formerly been adverse to the claim of the half blood; but, after the judgment was rendered in this case, he declared that, upon mature consideration, his opinion had changed, and that he concurred in thinking the half blood were entitled.

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(429) RICHARD M'CREE *v.* WILLIAM HOUSTON.

From Mecklenburg.

Alexander, upon the marriage of his daughter with M'Cree, made a parol gift to him of a slave. M'Cree kept the slave in his possession for seven years, and being about to remove out of the State, he made a parol gift of the same slave to his son, an infant of four years old, who, with the slave, remained with Alexander. Two years afterwards, Alexander sold the slave for a valuable consideration to Houston, who knew of the gift to M'Cree's son. This sale to Houston is good as against M'Cree's son, under the act of 1784, ch. 10.

This act makes *all plural* gifts of slaves void, as to creditors and purchasers, with or without notice.

Gifts of slaves, not void as to the creditors of the donor and purchasers from him, must be in writing, attested and registered, and made *bona fide.*

This Court adopts Lord Mansfield's construction of the statutes of 27th Elizabeth, and will support voluntary conveyances made *bona fide,* and founded upon a meritorious consideration, against purchasers for a valuable consideration.

This was an action of detinue for sundry negro slaves, Maria and her children; and the case was, that William Alexander, sen. was the owner of the negro slave Maria, and upon the marriage of his daughter Mary with William M'Cree, father of the Plaintiff, in the year 1789, he made a parol gift of Maria to his son in law, who kept her in possession until the year 1796; when, being about to remove to the state of Tennessee, he made a parol gift of Maria to his son Richard M'Cree, the Plaintiff, then an infant about three or four years old; and left the Plaintiff and the slave Maria with William Alexander, the grandfather of the Plaintiff. Afterwards, in the year 1798, William Alexander, for a valvable consideration to him paid, sold the slave Maria to the Defendant William Houston, who, at the time of the purchase, was fully apprised of the Plaintiff's claim to the slave. All the other slaves named in the declaration were the children of Maria, and the Plaintiff brought this suit within three years after his arrival to full age. The Jury, (430) under the direction of the Court, found a verdict for the Defendant; and a rule for a new trial being obtained, on the ground of misdirection by the Court, the case was sent to this Court.

Mordecai, for the Plaintiff.—There is no necessity for examining what would be the situation of the Plaintiff against a purchaser claiming under M'Cree the elder. No creditor of his nor purchaser from him sets up any claim, and no sale by Alexander could affect a gift made by M'Cree. 1 Vern. 45, Jones *v.* Purefoy. The question is, can a purchaser from Alexander, with full notice of the settlement made by him on his daughter, avoid that settlement, because it was not evidenced by deed? To determine this, it will be necessary to examine the statute of 1784, ch. 10: and whether we adhere to the letter of the statute, or extend the words to embrace cases which *have been construed* within its spirit, the Plaintiff must prevail.

As to the letter of the statute:—We think the Legislature have expressly provided for everything which that act was intended to remedy, and that, by going further, the Court will not *construe*, but legislate. The title of the act is "directing how deeds of gift and bills of sales of slaves shall be executed, authenticated and perpetuated." The preamble recites that "Whereas many persons have been injured by secret deeds of gift to children and otherwise for want of formal bills of sale for slaves, and a law perpetuating such gifts and sales." These are the mischiefs the Legislature proposes to remedy, and they go on to declare that "For remedy whereof, all sales (not all gifts) of slaves shall be in writing, attested by at least one creditable witness, or other-

wise shall not be deemed valid: and all bills of sale of negroes and deeds of gift of any estate of whatever nature, shall, within nine months after the making thereof, be proved in due form and recorded; and all bills of sale and deeds of gift not authenticated and perpetuated in
(431) manner by this act directed, shall be void and of no force whatsoever." The mischiefs recited are three. 1st. *Secret deeds* of gift; 2d. The want of formal bills of sale for slaves; and 3d. The want of a law for perpetuating such gifts and sales. The act provides a remedy for each mischief. 1st. Deeds of gift shall no longer remain *secret*, but shall be recorded within nine months, otherwise they shall be void; 2d. *All sales* of slaves shall be in writing; and, 3d. Such gifts (that is such as are evidenced by writing) and such sales shall be perpetuated by having the writing recorded. *Expressio unius est exclusio alterius. Quoties verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* The Legislature have told us the mischiefs which they intended to remedy: shall the Courts say there are *other mischiefs* which we think ought to be provided for, and we will take it for granted that the Legislature also intended to provide a remedy for them? If what is set up in this case on behalf of the Defendant had been deemed a mischief, for which a remedy should be provided by the Legislature, they could have provided such remedy by the insertion of two words: all sales "and gifts" of slaves shall be in writing, &c. The Legislature seem cautiously to have avoided the insertion of these words. Strong reasons presented themselves to the Legislature against the apprehension of such mischiefs from parol gifts. In all such gifts, the law required an actual delivery of the possession, which gave as much, if not more, notoriety than the recording or registering of a deed.

If all gifts were within the purview of the act of 1784, why did not the Legislature in the year 1792 put them on the same footing with sales? They declared by the act of 1792, ch. 6, that that act is to amend the act of 1784; and that notwithstanding the act of 1784 required that "*all sales of slaves should be in writing*," yet "that all sales of slaves *bona fide* made, and accompanied with the actual delivery of the slave or slaves to the purchaser, and which would
(432) have been held good and valid before the passing of the act of 1784, shall be good and valid without any

bill of sale." This was the precise condition of gifts at the common law: and the act of 1792 was intended to place sales on the same ground with gifts.

If such be the letter of the act, what is its spirit? The object of the act was to protect persons from being injured by *secret gifts*. If we are to construe it then according to the spirit, we should take care that no person be injured by such secret gifts. Why is there no necessity for a recorded deed between the parties? Because they know the transaction without a deed, and cannot be injured by the want of a deed. Will not the same reasoning apply to a purchaser from the donee? Will not the same knowledge, which prevents A. from avoiding his own gift, prevent B. likewise? If not, it is only necessary to change the color of the transaction, to let *A*. make *a sale* to *B*. and the provisions of the act are complied with, and the parties are safe. The object of the law is to give information, and whether it come in through the eyes or the ears is immaterial.

If there had been a deed, and that deed *not registered*, the case would have been within the very letter of the law: and how then would it have stood? A variety of cases shew that the party purchasing with notice of an unregistered deed, shall be affected by it, and his purchase be defeated, it being made *mala fide*. 3 Atk. 650. 1 Strange, 664. 2 Johns. ch. Rep. 608. It is true these are all cases in equity; but when a Court is making a construction upon a statute for the purpose of bringing a case, not within its letter, within the mischiefs it was intended to guard against, the construction, in equity and law, must be the same; and the notice is equally operative in law as in equity. 10 Johns. 461. 1 Burr. 474. Peake's N. P. 190, 191. 2 Mass. Rep. 506. 4 do. 637. 6 do. 29, 487. 3 do. Appendix, 575.

A. Henderson, for the Defendant.—This case does (433) not depend on the 27th Elizabeth, but is governed by the act of 1784. The acts of 13th and 27th Elizabeth declare all gifts made with intent to defraud creditors or purchasers void. Under these acts, if there be no intent, that is, an actual or legal intent, to defraud creditors or purchasers, the gift is good. Courts of Law have held certain acts fraudulent *per se*; such as continuing in possession of the property after an absolute bill of sale or deed of gift. But yet this is, because the purchaser or the donee suffers the seller or the donor to hold out to the world false colors, by which creditors or subsequent purchasers may be injured.

A few cases will shew what has been the current of decisions in this State upon the operation of the act of 1784. If a person make a gift, not indebted at the time, nor with a view to become indebted, the gift is void against subsequent creditors under the act of 1784 (2 Hay. 289); though such gift would have been good under the 13th Elizabeth. 1 Fomb. 271. In Pearson *v.* Fisher, decided in this Court (1 Law Rep. 461), and Shermon *v.* Russell (Do. 467), it was decided that a gift to a child, of a slave, not in writing, is void as to creditors under the act of 1784 In the latter case, the father was not indebted at the time of the gift, and the slave was given to a child that was a cripple. There was no actual intent in the father to defraud his creditors. He had ample property to pay his debts

In West *v.* Dubberly (Do. 467), this Court say, if the deed to the daughter was made with a view to defraud creditors, though clothed with the most solemn form, it would be void when opposed to such claimants; and if made without such motive actually existing, yet, if unattested by a subscribing witness, it is declared void by the act of 1784, which act our Courts have construed to extend only to creditors and purchasers.

(434) This act was not made to protect creditors and purchasers against fraudulent conveyances; for that was sufficiently provided for by the acts of 13th and 27th Elizabeth, and our own act on the same subject, passed in 1815; but it was made to prevent creditors and purchasers being injured by *secret sales* or *deeds of gift*, though the sale might have been for a fair price, and the gift on the most meritorious consideration.

It is apparent that the legislature had no eye to the fraudulent intent of the parties, as they place a sale on the same footing as a gift Their object was to prevent creditors and purchasers being injured by the secrecy of the transaction.

The act of 1792, ch. 6, makes the sale of a slave, accompanied with the actual delivery to the purchaser, and which would have been good before the act of 1784, good and valid without any bill of sale. What sale of a slave would have been good before the act of 1784? A sale for a valuable consideration: and what but the act prevented it being good after the act? Against whom would it have been held good and valid before the act? Creditors and purchasers.

The Plaintiff claims under his father, and, being a mere volunteer, stands precisely in his place.

Then what effect will notice of the claim of the Plaintiff have on the transaction? It can have no effect, if our construction of the act of 1784 be correct, because the act requires a *deed* of gift to pass the right to a slave or other property against creditors and purchasers. The moment the slave is purchased, the legal estate is vested in the purchaser. If the Plaintiff have any claim remaining, it is in equity.

That if he has any claim remaining he must resort to equity, will appear by the registry acts. In the case of Le Neve *v.* Le Neve, 3d Atk. 646, Lord Hardwicke says, it would be a most mischievous thing, if a person taking advantage of the legal form appointed by an act of Parliament, (435) might under that protect himself against a person who had a prior equity, of which he had notice. The case of Lord Forbes, in 3 Atk. 653, proves that notice cannot, under the registry acts, be taken advantage of in a Court of Law. In that case the conveyance to the trustee being registered, an ejectment was brought; notice was proved of the prior conveyance, but it was held, it would not do at Law, and an injunction was filed. The same doctrine seems recognized by this Court in the case of West *v.* Dubberly before mentioned.

But if the construction which has heretofore been put upon the act of 1784 should be thought by the Court to be erroneous, and they will now *change the law*, the next inquiry is, whether the gift be not void against purchasers by the act of 27th Eliz. ch. 4. By the very words of this act, the words "good consideration" mean valuable consideration. They are, "all persons who shall purchase for money or other good consideration." These words are taken notice of by Newland, in his Treatise on the Law of Contracts, 392, and in divers other books.

In 2 Ves. 10, Lord Hardwicke says, that every voluntary conveyance, where afterwards there is a conveyance for a valuable consideration, though there be no actual fraud intended, is void against creditors and subsequent purchasers.

In Evelyn *v.* Templar (2 Bro. ch. 148), A. by settlement *after marriage*, (not being indebted,) conveyed to trustees to family uses, reserving a power to sell, but covenanting that the purchase money should be paid to the trustees to be laid out to the same uses. He sold to B. who had notice of the covenant, but paid his money to A. who died insolvent. It was held that B.'s representatives should not be obliged to repay the money, because the settlement was voluntary, and fraudulent as against a purchaser: and the Lord Chancellor said, that although it would have been well, at first, if the voluntary covenant had not been thought so little of, (436) yet the rule was such, and so many estates stand upon it, that it cannot be shaken.

And here it may be observed, that although the fact of A.'s not being indebted at the time of his making the voluntary settlement might have been material, if we were considering the claim of a subsequent *creditor* under the 13th Elizabeth, yet as regards a *purchaser* under the 27th Elizabeth, it is entirely immaterial. Lord Hardwicke drew this distinction between 13th Elizabeth, which respects creditors and the 27th Elizabeth, which respects purchasers, in Lord Townshend *v.* Windham, 2 Ves. 10.

A father made a lease of his manors, &c. to trustees in trust for his daughter for twenty-one years, to the intent that the profits before her marriage should be for her maintenance, and for raising a portion if she married *P.* She did not marry P. but another, whom the father disliked, but afterwards he was satisfied with their marriage, and lived with them. It was held that the conveyance was voluntary and void. New. on Cont. 396. Siderfin, 133. 1 Ch. Ca. 216. Cro. Jac. 158.

The case of Newstead *v.* Searle, 1 Atk. 266, which seems to make against the Defendant, is explained by Newland, in his Treatise on Contracts, in page 399. Lord Hardwicke says, in Newstead *v.* Searle, " Here are reciprocal considerations on the part of the husband and wife, by the provision under the articles for the children of the second marriage."

The case of Doe *v.* Rutledge, Cowp. 705, is examined by Newland, in page 402. It was for want of a *bona fide* and valuable consideration in the purchaser of the estate, that Lord Mansfield determined the first deed to be good.

In the case of Hamerlin *v.* Millon, 2 Wills. 356, the limitation was supported by a valuable consideration directly applying to it.

In Bovey's case, 1 Vent. 193, the opinion of the Court was extrajudicial. The question was, whether a settlement after marriage, *but in pursuance of articles before marriage,* (437) to the husband for life, for the wife for life, then to the heirs, was void against subsequent purchasers for a valuable consideration. The Court held there was no color of fraud, the settlement being in pursuance of articles before marriage.

In Prodgers *v.* Langham, 1 Sider. 133, one of the decisions of the Court was, that though the deed was void in its creation as to purchasers, yet, the marriage having taken effect, the first settlement did not remain voluntary.

Kirk *v.* Clark, was determined upon the consideration of marriage. Though at first voluntary, the deed became good in consideration of the marriage.

In Brown *v.* Carter, Lord Alvanly considered the case of Kirk *v.* Clark to be a strong one.

The subject is well examined by Newland, from page 391 to page 405; and in 9 East. 39, Lord Ellenborough examines all the leading cases upon the subject, and shews conclusively that they establish the position, that purchasers for valuable consideration will hold against voluntary conveyances, under the 27th Elizabeth, to the full extent contended for in this case on behalf of the Defendant.

Gaston, in reply.—The gift from M'Cree, the father, is not attempted to be impeached: for no one pretends to claim as a purchaser or creditor from him. The only attempt is to impeach the gift from Alexander, the grandfather, to M'Cree, the father. This attempt is bottomed on two grounds: 1st. The act of 1784, ch. 10; 2d. The statute of 27th Elizabeth against fraudulent conveyances, to the injury of purchasers. We will examine each ground.

First, as to the act of 1784:—The Plaintiff denies, that whether this statute be now to be expounded, or is regarded as having a settled exposition; whether literally or liberally, by its words or its equity, it embraces the present case. All that he asks is, that the Defendant, after selecting his (438) ground, shall be obliged to meet him there.

Taken as *res integra,* this statute does not embrace the case of a parol gift. The preamble recites the mischiefs in the contemplation of the Legislature: "Secret *deeds* of gift to children and others, the want of formal bills of sale, and a law for perpetuating such gifts and sales." Twice, are gifts, and sales, here recognized and distinguished as different modes of transfer. In regard to the first, the injury arises from secret deeds of gift; but as to the second, from sales without deed. The first was injurious, whatever the nature of the property given; but the second only injurious where slaves were transferred; and there was a general mischief, that such deeds of gift and bills of sale could not be perpetuated. To meet these evils, thus distinguished, ("For remedy whereof,") it is enacted, that all *sales* aforesaid should be by deed, attested. This cured the second evil. Next, that "all deeds of gift, of whatever kind," should be proved and recorded. This cured the first evil: and lastly, all bills of sale and deeds of gift not so authenticated should be void. This met and remedied the last mischief.

It would manifestly seem that the Legislature forbore from regulating gifts made by parol. If this intention appear, we are bound to presume that they had a sufficient reason for declining to act on them. But reasons readily suggest themselves. Gifts made to a child on marriage were an established mode of transfer, and highly favored. They had the notoriety attending the old mode of feoffment. The Legislature were not disposed to break in too violently an old and fixed usage. Besides, "every proper gift by parol must be accompanied with delivery and take effect immediately," otherwise it was a mere contract which passed no right, and could not be enforced but on sufficient consideration. 2 Bl. Com. 441. But on a sale, "as soon as the bargain was struck, the property of the goods passed to the vendee, (439) so that property could pass therein *in futuro* and without delivery." 2 Bl. Com. 448. It might be thought safe, therefore, to leave parol gifts to the operation of Common Law principles, and to the statutory regulations against frauds, in affirmance of the Common Law. For, according to them, they were absolutely void without delivery; and void against creditors and purchasers, unless made *bona fide*. Honest gifts, attended by a notorious delivery, they might not wish to invalidate.

But it is objected, that if this act be thus construed, evils will be left which it does not redress. To meet these evils, to prevent fraud and perjuries, all parol proof must be rejected, and this act turned into a statute against frauds and perjuries. There is a quackery in legislation, as in medicine, more dangerous than entire forbearance. To cure all political maladies by a legislative act, as by a charm, is an idle hope. Remedies are always best which are gradually alterative. Whether parol proof should be rejected of ordinary transactions, is a grand question, not to be decided without much deliberation. It has been much questioned, whether the existence of such a rule elsewhere, has not produced more frauds than it prevented.

At all events, our Legislature have not intimated that perjuries were the evils they meant to cure in regard to gifts, but *secrecy only.* Nor does it follow that the last was to be cured as a mad surgeon would cure a wart—by amputating the limb. They preferred to tolerate some, of which they knew the extent, rather than fly to others they knew not of. Whether their decision was wise or unwise, is not left to Courts to decide.

It is further objected, that, according to this construction, parol gifts are less restrained than parol sales; and this is too gross an absurdity for a Legislature to be guilty of. If the danger of abuse in the one case were better guarded against by existing regulations than in the other, there is no absurdity, but a wise providence in applying their vigi- (440) lance exclusively to the latter. Practical men should make laws to meet actual, and remove probable mischiefs, and not to accommodate their acts to the fancied symmetry of the theorist. But suppose this excessive comparative restraint of parol sales were an evil, it was proper for legislative remedy, and has obtained it. By the act of 1792, ch. 6, amendatory of the act of 1784, (universally ascribed to the late Judge Moore as its author,) parol sales are freed from this inconvenient restraint, and placed precisely where the former act left parol gifts. "*Bona fide* made and accompanied with delivery," they are declared good without a bill of sale. The act being made in *pari materia,* and exactly meeting and removing the objections made to our construction of the former act, is the strongest legislative declaration that our construction is true.

If, however, these objections had all the weight attributed to them, they would not avail to enlarge the operation of the law, unless the enacting words could, without violence, be so interpreted as to comprehend them. In a case in 3 Cranch, 155, it was admitted that the terms "all mortgages and deeds of trusts whatever," were sufficiently comprehensive to take in mortgages as well of personal as of real property. But the inquiry was, whether these general terms were not to be restricted by a reference to other parts of the act, so as to leave out mortages of personal property: and the Court were strongly inclined to think so, had it not been for the inconvenience which would have resulted from such restriction. But are there any words in this act, which, taken in any sense, popular or legal, can cover the supposed enactment? A desperate attempt is made to embrace *gifts* under the word *sales:* "all *sales* of slaves shall be in writing."

It is admitted that the word "*sale*," in its popular sense, not only excludes *gifts*, but is used in opposition to gifts. But it is alleged, that in a technical or legal sense, it comprehends gifts. This allegation is believed to be (441) wholly unfounded. The word *purchase* is applied to real property according to its original feudal meaning, comprehending in it every mode of acquiring lands other than by descent. But the word *sale* never was used either popularly or legally, in lands or chattels, to comprehend other than transfer by bargain for money or other valuable consideration. Purchase, in its legal signification, is not the correlative of sale; for it takes in acquisitions by escheat, occupancy, forfeiture, prescription, and every sort of alienation. *Purchase*, in its popular sense, is the correlative of *sale;* and then it means "an acquisition obtained by way of bargain and sale for money or other valuable consideration." 2 Bl. Com. 241. And in regard to personal property, gifts and sales are perfectly contradistinguished. "Gifts form one of the methods of acquiring an interest in chattels, while contracts form another, and sales are regarded as one species of executed contracts." Do. 440, 442, 446.

But let it be conceded that the word *sale* covers every mode of transfer, we have a right to insist that the same meaning be given to it throughout. The original and amendatory act unquestionably form but one statute. There it is dedeclared, that sales *bona fide* and accompanied with delivery, are valid without deed. This act received its final form in 1792, while the negro was in the hands of M'Cree's father, *bona fide*, and delivered under a parol gift. The Legislature confirm this gift; they make it perfect; they put it out of the power of Alexander, by collusion with any purchaser to avoid it. After this legislative enactment, putting it under the shield of the law, how impotent the attempt of Houston, six years thereafter, to assail it.

It is insisted by the Defendant, that the settled construction of this act, by judicial decisions, destroys the gift of Alexander to M'Cree, and in facts forbids an enquiry into the actual meaning of the act of 1784. On our part, we acknowledge that prior adjudications are always entitled to high respect, and that, although a few precedents (442) cannot make the law, when they are clearly shewn to be erroneous, there is a period, after which it is unwise to disturb them. It will be shewn that such is not the case here. But were it otherwise, the Plaintiff is entirely satisfied to rest his case upon the construction which has obtained. He claims to stand on the vantage ground of authority, as well as of reason, and is as ready to combat his adversary with decisions, as with arguments.

The first case to be found in the books, is that of Knight *v.* Thomas, decided at Halifax, in April, 1796, and reported in 1 Hayw. 289. It does not appear whether Knight claimed under a gift or a sale; but the case shews that the Court and the Bar thought that the act of 1784, did not avoid a parol conveyance of slaves between the parties, but only as to creditors (and others within the same mischief) who trusted the donor or bargainor on the faith of his visible property. This case is believed to have been decided by Judge Haywood alone.

In September, 1798, was tried the case of Latham *v.* Outen, reported 2 Hay. 66. There Judge Haywood, alone on the bench, declared his sense of the act of 1784 to be, that it not only required deeds of gift to be recorded, but also to give validity to gifts, that they should be made by deed and recorded, otherwise the operation of the act might encourage secret gifts, which were meant to be discountenanced. The particulars of the case are not stated, so as to enable us to pronounce what part of these observations should be deemed, strictly speaking, judicial. But in March, 1798, we meet with the case of Hancock *v.* Harvey, reported in 2 Hay. 86. This case gives us the most satisfactory exposition of Judge Haywood's doctrine. On an action of detinue for a slave, which had been given, and delivered in the presence of witnesses, and retained in possession for years, (precisely the case before the Court,) it was objected that there should be a deed. Judge Moore adopted the construction, which, if the question were *new now*, ought to be adopted; and declared that the act did not require a deed, but only (443) that a deed when given should be recorded. Nor did he content himself with a bare enunciation of his opinion: he gave his reasons at length with his usual perspicuity and force, though the reporter has forborne from stating them. His brother Judge, being the reporter, has given his own reasons at length, and declared that in this case no deed was necessary. For this he assigned two causes: one that neither creditors nor purchasers were parties to the suit; the other, that "this was not a secret transaction, incapable to produce publicity; for a delivery is made, and possession only kept; that the act aims only at secret transactions, and that had it been secret and a creditor concerned, a deed would have been necessary."

The only authority in point is that of Sherman *v.* Russell, 1 Law Repos. 470, in which a bare majority of the Supreme Court gave their sanction to Judge Haywood's construction. That the present case is not concluded by that of Sherman *v.* Russell, is manifest in this, that the very Judge who delivered the judgment in Sherman *v.* Russell, has brought this case up, because he doubts of the law.

Adopting, then, Judge Haywood's interpretation thus sanctioned, as the law, what is its bearing on the present case? It is established that the object of the law was to put down secret conveyances of slaves, to the injury of creditors or purchasers: that where creditors or purchasers are not concerned, as the case cannot come within the mischief, the conveyance by parol is good: and that when the gift is public and attended with delivery, it comes not within the mischief, and therefore not within the purview. We are told "*stare decisis*," and we are content to abide by decisions; but we insist that they should be adhered to altogether. Secret gifts are within the same mischief as secret deeds of gift. Be it so, and let them both be void. The remedy against the mischief of secret deeds is to require publicity; and the security against secret gifts is to demand notice or publicity. Deeds (444) of gift duly notified are good, because they put the creditor or purchaser on his guard; and on what principle shall gifts be bad of which the creditor or purchaser has been actually informed? Perhaps the Courts were right in extending the operation of the law by equity, in order to meet its mischiefs; but assuredly they cannot enlarge its meaning in order to do mischief. They may take the liberty of throwing a shield over the possession of a *bona fide* purchaser, but certainly not to furnish a *mala fide* purchaser with a sword, wherewith to assail the rights of others. All the decisions admit that the gift is good between the parties, and is only void as against a purchaser or creditor. Assuredly they mean a *bona fide* purchaser; for an estate acquired by fraud is in the eye of the law, as no estate. Co. Rep. 17. Freeman's case. Now a purchaser with notice of a right in one from whom he does not buy, is always regarded as a fraudulent purchaser; and here it is that the adjudications on the registry acts come in with decisive effect. The cases of Le Neve *v.* Le Neve, 3 Atk. 646, and of Chenal *v.* Nichols, 1 Strange, 664, on the registry acts in England, state that the intention of those acts is to secure subsequent purchasers against prior secret conveyances; that the taking of an estate after notice of a prior right, makes a person a *mala fide* purchaser, and puts him out of the equity of the statute. It is true that these cases were decided in a Court of Equity, and not in a Court of Law; but the principles which they contain have been shewn to be equally recognized in all Courts. 1 Burr. 474. Peake's N. P. 190, 191. 10 Johns. 461. 2 Mass. Rep. 506. 4 do. 637. 6 do. 29, 487. And as the question here is not of a trust binding on the conscience, but of the true construction of a statute, there can be but one sound interpretation to be given to the act either in a Court of Law or Equity.

The case of West and wife *v.* Dubberly has been quoted to prove that under the act of 1784, notice to a purchaser is entirely immaterial; but the notice which Loftin had (445) is stated in the case to have been prior to his purchase under execution. Clearly such a notice does not affect the purchaser, provided the creditor had a right to sell. The purchaser, under an execution, represents the creditor, and is clothed with his rights, and armed with his immunities. 2 John. ch. Rep. 50. If the gift under which the Plaintiff claimed, was void as against the creditor, for whose benefit the execution issued, the purchaser under such creditor had also a right to avoid it.

The attempt which has been made to turn the Plaintiff round and send him into a Court of Equity for relief, is extraordinary. The letter of the act does not require a deed: the estate, as between the parties, passed by parol gift and delivery. But the Defendant claims that he should be protected by the Equity of the statute in his subsequent purchase; and when this claim to protection is repelled, by shewing that his purchase is not within such Equity, then he objects to the validity of this answer in a Court of Law. In other words, he insists that an equitable enlargement should be given to the operation of the statute to protect his iniquitous claim, and sends the Plaintiff to a Court of Equity to be relieved against the iniquity of this equitable construction!

It is argued, that we must follow analogous decisions on the 27th Elizabeth; and these declare that notice to a purchaser of a prior voluntary conveyance will not prevent his avoiding it. Before the revolution there was a strong current of British authorities, many of which are mentioned and commented upon by the Defendant's counsel, establishing the principle that a voluntary conveyance, if *bona fide* made, was not void against a subsequent purchaser. It seems, however, that it has since been settled that a voluntary conveyance is necessarily fraudulent against such purchaser. It had been early decided that a conveyance *actually* fraudulent could not be sustained, because of notice: and as a voluntary conveyance is in presumption of Law now deemed fraudulent, the notice avails nought against it. This (446) doctrine is not only repugnant to reason, 1 Fonb. 278, but is admitted by the most intelligent English Judges to be erroneous: and while they follow it because it is too firmly fixed to allow them to act freely, they lament the necessity which permits them not to exercise their own understanding. 2 Bro. ch. 148. 9 East. 71. 4 Bos. & Pul. 332. And why should we imitate an avowed error? The decisions made in England bind not our Courts. They have been made on the statute of Elizabeth—not on our act of 1784. They relate to voluntary conveyances of *lands*, and have no operation on a gift of chattels. These decisions ought to be regarded by us as beacons to indicate error, not as guides to truth.

2. The attempt to impeach Alexander's gift as fraudulent under the statute of Elizabeth 27th, has been (comparatively) but little relied on. The statute of 13th Elizabeth for the protection of creditors is re-enacted in this State.—See act of 1815, ch. 38. But that of the 27th Elizabeth for the protection of purchasers has not been re-enacted. The Legislature probably thought that the common law afforded purchasers all the protection which was desirable, when it avoided con-

veyances made to their injury, which were actually fraudulent. But the statute of 27th Elizabeth, by its terms, as well as its invariable construction, operated only on conveyances of real estate, or interests in real estate. Gifts and conveyances of chattels have been left in England, and ought to be left here, to the operation of the Common Law. That sustains them if honest, and annuls them if fraudulent. But even in England, in regard to gifts of real estate, and under the most rigid construction of the statute of 27th Elizabeth, such gifts have never been deemed purely voluntary, if they appeared to contain some conventional stipulations, some reciprocity of benefits, something in the nature or spirit of a contract, and point out any object or motive beyond the indulgence of affection or claims of kindred. Roberts (447) on Fraud. Convey. 65 to 103. Here, if an actual contract be not shewn, one is clearly implied. At all events, the Jury ought to have been left at liberty to find a contract, instead of being peremptorily instructed by the Court that the Law was with the Defendant. M'Cree marries the daughter of Alexander, and thereby relieves Alexander from the legal obligation of maintenance. A gift made to M'Cree, at the moment he renders this valuable consideration to Alexander, ought to be regarded as being an equivalent and in the nature of a recompence therefor. It is not a gift purely voluntary.

Hall, Judge.—There can be no doubt but that the Plaintiff would be entitled to recover on Common Law principles. The slave Maria was given by Alexander to his son in law, M'Cree, who had notorious possession of her for six or seven years He then gave her to the Plaintiff, his son, who was an infant, and remained with Alexander, his grandfather, after his father's removal. Some time afterwards, Alexander sold the slave to the Defendant. It is not pretended that these gifts were not *bona fide* made: and, therefore, whether if the first gift had been made in secret, and the father in law had retained possession of the slave so given, and had afterwards sold her to a purchaser for a valuable consideration without notice, it would have amounted to one of those cases of fraud, which Lord Mansfield says, the Common Law would have reached without the aid of any statute (Cowp. 434); or whether a right was thereby created in the donee, although fraudulent, which could not be divested by him who afterwards acquired a right without fraud (3 Co. 83. Cro. Eliz. 445), it is not necessary now to decide.

But it is necessary to consider, 1st. Whether the statute of the 27th Eliz. ch. 4, interposes any obstacle to the (448) Plaintiff's recovery? and if not, 2d. Whether he is prevented therefrom by our act of 1784, ch. 10, sec. 7?

I think the statute of the 27th Eliz. does not extend to this case; because the subject in controversy is a personal chattel, and that statute in express terms extends only to real property and leases for years. It declares that all covinous and fraudulent conveyances of lands, tenements and hereditaments, shall be void as to subsequent purchasers for valuable consideration. No words are used which comprehend personal property. If the rule be applied, "that statutes made in supression of fraud should receive a liberal construction" (3 Co. 82. a.), the statute does not embrace the present case. The statute of 13th Eliz. in favor of creditors, speaks not only of lands, &c. but also of goods and chattels; and if it had been intended that the statute of 27th Eliz. should extend to goods and chattels, it would have been so expressed. It may be further observed, that the statute of 13th Eliz. in the third section, declares that the parties to such fraudulent conveyances, as it is made to avoid, shall incur the penalty of one year's value of the land, and the whole value of the goods and chattels: but the statute of the 27th Eliz. which inflicts the same penalty as to lands, &c. is altogether silent as to the personal property.

But admitting that the statute extends to goods and chattels, and that the gift to the Plaintiff was legal and not affected by our act of 1784, it would be with difficulty that I could bring my mind to adopt such a construction of it as would prevent a parent from acting in obedience to one of the most sacred duties imposed upon him by the laws of nature, that is, making suitable provision for his children. When a child marries, and separates from his or her parent, the first thing that occurs to the mind of the parent is, what part of his property, in justice to himself and perhaps to other children, ought he to give by way of advancement. Perhaps, as in the present case, he can spare a negro girl to assist (449) his daughter; when he has done this, he thinks he has only done his duty, and the world thinks so too. Keeping out of view adjudications on the subject, let us see whether the Parliament of England thought otherwise when they passed the statute of the 27th Eliz. In the preamble, as well as in the body of the statute, fraudulent conveyances are complained of, and declared void in favor of *purchasers for money or other good consideration.* In the proviso contained in the fourth section, it is declared that the statute shall not extend to purchasers *upon or for good consideration* and *bona fide.* The result seems to be, that as the conveyances sought to be set aside were made *upon a good consideration and bona fide,* they were not fraudulent, and therefore not within the statute. And in this sense are the same words used in the statute of the 13th Eliz. But it has been decided, that although in the preamble and body of the act, the conveyances there spoken of are set aside in favor of subsequent purchasers for money or other good consideration, that the words "good consideration" means *valuable consideration.* 3 Co. 83. The necessity of the case required this construction; because, if it had been held that conveyances should be set aside in favor of subsequent purchasers for a good consideration, this dilemma must have been encountered, that conveyances for a good consideration and *bona fide,* spoken of in the proviso, must be set aside in favor of subsequent purchasers for good consideration; which would be absurd. It was therefore unavoidable that the words "or other good consideration," in the body of the act, should be construed to mean *valuable consideration.*

But it has also been decided, that as the words "good consideration," in the body of the act, means *valuable consideration,* the same words in the proviso in the fourth section means the same thing. Surely they ought, if there be the same necessity for it. We have seen, in the case first put, that there is a necessity for it. In the case last put, (450) that necessity is not so obvious; and, if not, why shall we not be governed by the plain import of the words? By doing so, the child would retain what justice required the father to give it, and what he had given *bona fide;* and not be dispossessed whenever the whim and caprice of the parent might cause him to sell it to a purchaser for valuable consideration, whether he had notice or not of the gift to the child. But, says Newland, in his Essay on Contracts (Newl. 408), after reciting the arguments on both sides of the question, "Although these arguments may shew that a different construction, with respect to voluntary conveyances founded on a meritorious consideration, ought at first to have been put on this statute, it is now too late to dispute this point; it having been settled by several solemn decisions, that such conveyances, notwithstanding the merit of their consideration, are, with respect to purchasers for valuable consideration, fraudulent and void."

Be this as it may, the Law was understood differently in 1777 (Cowp. 710), shortly after we separated from the mother country. And if the Law, as then declared by Lord Mansfield, meets with our approbation, it would be wrong to sacrifice our opinions to decisions which may have taken place since; more particularly, as I think, the construction then put upon the statute is more suitable to the nature of personal property in this State than a contrary one.

I am aware that some decisions have taken place in this State, which indicate that those who made them thought differently. But it may be observed, that the question we are now considering was not made. In the case of Ingles *v.* Donaldson (2 Hayw. 57), which was an action brought for a slave, it is to be regretted that the question was not made; as we could have had the opinion of Judge Haywood on it. No one holds his judicial opinions in higher estimation than I do. But it will be readily seen in that case, that the Court took it for granted that the statute applied to the (451) case, and its mind was only occupied in the proper application of the principles of the statute. The cases referred to in Ingles *v.* Donaldson prove this. Buller Ni. Pri. 260. 5 Co. 60. They were cases of real property, and prove nothing against what I now contend for.

But if this statute be not in the way of a recovery, we are, secondly, to inquire whether the act of 1784 operates to prevent it.

I am satisfied, for the reasons given in Sherman *v.* Russell (1 L. Rep. 467), that the act of 1784 requires that all gifts, as well as sale of slaves, shall be in writing; otherwise, as there expressed, it would follow that parol gifts, although the donee did not remain in possession after the gift, would be good, and a parol sale for a valuable consideration, and accompanied with possession, would be void: a difference between gifts and sales which I think the Legislature never intended. And were we now, for the first time, to fix a construction on the act, I would say, that all parol gifts and sales should be void as between the parties thereto; that no person should be divested of his property in slaves by parol evidence; that a title to slaves should not be conveyed to any person *by parol;* and that all such titles should be, as the act emphatically expresses it, void. But this question has been put to rest by the case of Moses Knight and wife *v.* Theophilus Thomas (1 Hay 289), amongst others. In that case it was said, that it had been decided by the Court that a parol conveyance of negroes was good as between the parties, but was void as to creditors; as well creditors after the conveyance as those who were such at the time; and with those decisions the Court in the case agreed. And in an anonymous case reported in 2 Hay. 86–7, it was held by the Court, that as the slave was delivered and the possession kept by the donee's guardian, no deed of gift was necessary, because creditors and purchasers were not concerned. There was certainly another reason, and that created by the act, and that was, that a person should not be compelled (452) to part with his slaves, except a written conveyance for them be produced against him; for, in this respect, he was shielded as by the statute of frauds and perjuries.

The act declares that "Whereas *many persons* have been injured by secret deeds of gift to children and others, and for want of formal bills of sale for slaves, and a law for perpetuating such gifts and sales, for remedy whereof, &c. Be it enacted, that all sales of slaves shall be in writing," &c. The remedy was for creditors and purchasers, for none others could be injured; as to them, all gifts and sales of slaves not in writing were void: more particularly as to purchasers; for laws had been enacted before that time for the benefit of creditors. If the law then required that all conveyances of slaves, should, as to them, be in writing, it followed that sales and gifts not in writing should be void, and the original owners, as to creditors and purchasers, should still be considered as the legal owners, so that they could convey the property in slaves to subsequent purchasers by deed, whether such purchasers had notice of a former gift of sale without deed or not: for, if they had notice, they thereby knew that such sale or gift, as to them, was void. It would not do to say that the title of such donee or vendee depended upon the fact, whether the subsequent purchaser had notice or not. The act of 1784 declares such gifts and sales to be void, but says nothing about notice. If the act under such circumstances declares the Defendant's title to be good, we have no right to say that it shall *not* be good, because another circumstance does not appear; namely, that he purchased without notice. This is not like the case, where a person has a title made to him, knowing at the same time of another person's equitable title to the same property. In such case the legal title would prevail at Law, but the person obtaining the legal title would, in equity, be considered a trustee for the equitable claimant. So in this case, if the Defendant were to apply to a Court of Equity for a favor, (453) stating that he had notice of the Plaintiff's claim when he purchased, perhaps he would not, on that account, meet with redress. But here we can only notice legal rights. In the case of Latham *v.* Outen, 2 Hay. 66, it was not only decided that upon a gift made by a parent to a child, a deed of gift shall be executed and proved and registered, but that a subsequent purchaser, as Latham was, should be entitled to the property in case there was no deed. No question was then made whether Latham had notice of the gift to the daughter or not; and I take it for granted, that the Court considered that circumstance immaterial, or notice would have been taken of it as weighing something for one party or the other. Upon full consideration of the case, I think the rule for a new trial should be discharged.

HENDERSON, Judge, concurred in opinion with Judge Hall.

TAYLOR, Chief-Justice, contra. I do not intend to inquire whether the act of 1784 was correctly construed at first, because whatever my individual opinion might be, a series of decisions to the same effect, long known to the public, acquiesced in by the Legislature, and sanctioned by the Court of *dernier resort*, must be considered as establishing the Law. But it cannot be denied, that those decisions have been the result of an equitable construction of the act, placing within its action parol gifts, because they were within the mischiefs designed to be suppressed; and taking out of its words, and giving validity to gifts between the parties, where there were no creditors or purchasers, because it was for the protection of their rights, and for that object alone, that the act was made.

To my mind it seems fair and conclusive reasoning, that the spirit of this interpretation shall be pursued through its consequences, and that every parol gift, which is (454) assailed on the ground that it is forbidden by the Equity of the act of 1784, shall be defensible under the same act, not only where there are no creditors or purchasers, but likewise, where there are none whose rights can be affected by the construction. It may be supposed, that if the Legislature had explained themselves fully upon the subject they would have said, "So far as these parol gifts have a tendency to injure other persons, to wit: creditors or purchasers, we mean to put an end to them. The injury may be effected by fraud, or by secrecy, one of its badges; and the presence of either shall render the gift a nullity against those persons. Whatever may be the character of the gift, however, it shall prevail against the donor, and all volunteer claimants under him; to the end, that, if it be fair, the donor shall not be enabled to practice a fraud upon the donee by resuming the gift, and if it be fraudulent, that the donor may be punished for having practised it." So far as any number of cases has settled the construction of the act, they have been guided by the spirit of this reasoning to the utmost extent of which I should be willing to go in any future cases; giving effect to the probable intent of the Legislature, by putting down parol gifts, when made to the injury of others, but sustaining them, when that consequence cannot possibly be produced.

I will now briefly examine the character of this transaction as it appears upon the case stated: Upon the marriage of his daughter with William M'Cree, Alexander gave him, by parol, the slave sued for; the gift was accompanied with a delivery, and followed by seven years possession in the son in law. The obvious motive of the gift was, the duty of providing for a child on her establishment in life; the consideration of it was marriage, which, says Lord Coke, is more esteemed in the Law than any other, "in respect of alliance and posterity." The marriage consideration has been, from early times, considered sufficient to raise an use, on account of the benefit derived to the father by the advance- (455) ment of his child, and his being relieved from the charge of maintenance (Plowd. 58); and it is such a consideration as makes a conveyance good against purchasers under the statute of 27th Elizabeth. There was not the slightest ground to impugn the fairness of the transaction between Alexander and his son in law, unless it could be imagined that he intended, when he made the gift, to deceive some future purchaser. I should be unwilling, without a necessity enforced by the plain meaning of the words of the act, to annul a transaction characterised by so much fairness, and to enable a third person to gain prosperity at the expense of an innocent and meritorious acceptor of a parent's bounty.

Nor does the act, in my opinion, require a construction favorable to a purchaser with notice, where the gift between the parties was fair in itself. There is a solid reason why notice to a subsequent purchaser should make no difference, where the first transaction is fraudulent: for then, when he has notice, he knows also that it is void; and to prefer the purchaser's title in such case, is to discountenance and suppress fraud. There is an obvious difference between a gift really meant by the parties to deceive some third person, and one which is fair and upright in itself, but which the Law, in pursuit of a certain policy, pronounces void against a subsequent purchaser. In the latter case, the inquiry whether the purchaser had notice forms an indispensible ingredient in the justice of the case; and when the notice is fixed upon him, it stamps his claim with the odium of attempting to divest the title of a prior owner, whose acquisition was not only fair, but, as in this case, singularly meritorious. Hence the regret expressed by the English Judges, that the constructions upon the statute of 27th Elizabeth should have rendered voluntary conveyances void against subsequent purchasers with notice. Admitting the voluntary conveyances to be fair also, this regret is perfectly natural; but would be altogether misplaced upon the supposition that they (456) were fraudulent in fact. In truth, it is only by a process of subtle and artificial reasoning that voluntary conveyances, made *bona fide*, are brought within the operations of that statute: such as making a subsequent sale a proof of an original intention to deceive. From persons aware of this, it is not surprising to meet with the following observations: In *Evelyn v. Templar*, 2 Bro. 149, Lord Thurlow said, "that although it would have been as well, at first, if the voluntary conveyance had not been so little thought of, yet the rule was such, and so many estates stand upon it, that it cannot be shaken." In Doe *v.* Martyn, 1 N. R. 335, Mansfield, Chief Justice, "regretted that it had ever been decided that even notice of the prior settlement would not defeat a subsequent purchase." In Doe *v.* Manning, 9 East. 71, Lord Ellenborough says, "it would have been better if the statute had avoided conveyances only against purchasers for valuable consideration, *without notice of the prior* conveyance." These remarks, and many others scattered through the books (Newland on Contr. 408), render it probable that a wrong construction has been put upon the 27th Elizabeth; and that if it were now to be construed for the first time, purchasers with notice would not be protected by it. The English Judges are fettered by a long chain of precedents. We are not so; but at liberty to adopt that construction of the act of 1784, upon this point at least, which is more consonant with the views of the Legislature.

In a gift fairly made, which this undoubtedly was, I am unable to distinguish between the donor and voluntary claimants under him, and a purchaser with notice, except to the disadvantage of the latter. Against the donor, the donee is protected in the enjoyment of the property, because gifts between them were not the mischiefs intended to be suppressed. Shall a person "fully apprised of the donor's (457) claim" be in a better situation than the donor, and bottom his title upon an act, the preamble of which speaks only of the injury done by *secret* deeds of gift? To him, most clearly, the gift was no secret: he paid his money with his eyes open, and with a mind full conscious that he was buying property which, according to every principle of honesty and rectitude, belonged to another person. In this view of the case, I am unable to bring my mind to a construction of the act of 1784, which shall prefer the title of the purchaser with notice to that of the donee. For I believe the effect of such a construction will be to suppress fraud in one shape, and cherish it in a different and more odious one.

On the remaining question, whether notice be a fit subject for consideration in a Court of Law, I have no doubt. If the just construction of the statute will not sustain the title of a purchaser with notice, he is no more entitled to the support of a Court of Law than to that of a Court of Equity; for the true meaning of a statute is equally within the cognizance of both Courts. In all cases of fraud too, they have concurrent jurisdiction. The *mala fides* here consists in the purchaser's assisting the donor to defraud the donee; and the fact being established by means of the notice, neither Court ought to sustain the title. If the act is silent as to the notice, so likewise are the 27th Elizabeth, and what are called the registry acts: yet the cases cited shew that the question has been considered in both; to which may be added Cro. Jac.

158, where the want of notice is a fact stated in the case, on which the Law was pronounced. And as to considering notice at Law, many cases shew that it may be done. 1 Burr. 474. Peake's N. P. 190, 191. On this head of notice the case presents a question which has never been decided in this Court, nor has the Law been settled by any current of decisions on the circuit. The case of a purchaser at a sheriff's sale is not applicable; for he is armed with the rights of, and stand on the same eminence with, a creditor. My (458) opinion upon the whole case is in favor of the Plaintiff, and for the reasons I have given: but, as both my brothers think differently, there must be judgment for the Defendant.

FORREST *v.* HART.

From Halifax.

A. and B. made a wager on a horse race in 1816. The money was deposited with a stakeholder, and, after the race was run, A. demanded of the stakeholder his deposit. The stakeholder refused to return the deposit, and A. brought an action for money had and received. A. is entitled to recover; for

The act of 1810, ch. 14, prohibits the creation of any right on the event of a horse race, and leaves the parties, as to any remedy, precisely where they were if no such agreement had been made.

As long as the money remains in the hands of the stakeholder, it belongs to him who has the *legal right;* and the legal right, which was in the person depositing, when the deposit was made, cannot be divested out of him and placed in another by the event of an illegal wager.

Whilst the money is *in transitu*, before it comes to the actual possession of the winner, by the direction of the loser to pay it over, after the event, or by his omitting to forbid the payment, when he might, if he thought proper, it is subject to be reclaimed by the person who made the deposit.

This was an action for money had and received. The Plaintiff and Henry Hunter made a wager on a horse-race in the year 1816. The money was deposited in the hands of the Defendant as a stakeholder. After the race was run, the Plaintiff demanded of the stakeholder a return of his deposit, which was refused, and this suit was brought to recover it. The presiding Judge refused to admit any evidence to shew which of the parties won the race, and instructed the Jury, that if the Plaintiff demanded his deposit of the stakeholder, after the race was run, and before it was paid over to Hunter,

he was entitled to recover. The Jury found a ver-
(459) dict for the Plaintiff, for the amount of the deposit
and interest from the time he demanded it of the stakeholder. A rule for a new trial being obtained by the Defendant, the same was discharged by the Court, and the Defendant appealed.

Mordecai, in support of the rule.—The act of 1810, ch. 14, declares in its preamble, that "Horse-racing is productive of many evils to the good citizens of the State," and therefore avoids all contracts respecting it. When a man comes for relief into a Court of Justice, he comes with an ill grace, when, by his own shewing, he has been guilty of an offence to the Laws, and the loss for which he asks relief has been brought upon him by his contempt of them. Parks Insur. 8. *In pari delicto, melior est conditio possedentis.*" In Lowrie *v.* Bordieu, Doug. 451, 467; 8 Johns. 147, Lowrie paid his money on a wager, waited till it had been won by Bordieu, and then sued to recover his stake; and it was held he could not recover. In Andrew *v.* Fletcher, 3 Term Rep. 266; 2 do. 162, Andrew paid his money *on a wager which he won*, Fletcher refused to pay, and Andrew sued for his stake, which it was unconscientious in Fletcher to retain. But the Court held he could not recover, and that the principle was the same as in Lowrie *v.* Bordieu.

The act of 1810, ch. 14, against horse-racing, is copied from the act of 1788, ch. 5, against gaming. In Hodges *v.* Pitman, 2 Law. Repos. 394, this Court decided that money fairly won and paid over could not be recovered back. If then the money had been paid by Forrest, it could not be recovered back.

Does the intervention of a stakeholder make any difference? Consider the character of a stakeholder: for what is he constituted? The parties being unwilling to trust to the honor of each other, it becomes necessary to the execution of a contract that a third person should step in as ther mutual
agent, with such powers as may be necessary and
(460) sufficient to secure the performance of their contract.
His powers are coextensive with this necessity: where the necessity ceases, his powers cease. He has all power necessary to the execution of the contract, to-wit: to keep the money in his hands until the event is decided; and when decided, to pay it over to the person to whom it belongs. But

were he permitted to pay it to the loser, it would defeat the execution of the contract, and be a manifest breach of trust.

The action for money had and received, lies where Defendant has money which he cannot with a safe conscience keep; but not for money which is due in point of honor or conscience from the Plaintiff, although the payment could not have been enforced by Law. 2 Burr. 1005. Evan's Essays, 4.

Howson *v.* Hancock (8 Term Rep. 575). only decides that when the money is paid over by consent of the loser, he cannot recover it back. In Cotton *v.* Thurland (5 do. 405), Lord Mansfield says, " If the Defendant in this case had paid over the money to the winner, *perhaps* he would not have been answerable, but here it is still in his hands." He clearly does not mean if he had paid it over with *the assent of the loser ;* for then he could not have been liable. He means under the circustances of the case, forbidden as he was to pay it. In that case it appeared that the wager was not decided : there was a dispute who was the winner.

The proper view of the case is this: Where the wager is legal, and such as might be recovered, the stakeholder cannot return the stakes without the assent of both parties, for each has an interest in the whole. Where the wager is illegal, there is a *locus penitentiæ* to each, until the event is decided, and either may, without the assent of the other, reclaim his stake. And this is, because the Law will afford to every man about to violate it an opportunity to stop and retrace his steps. But after the event is decided, the repentance comes too late, and the Law will leave him as it (461) finds him. 1 Esp. N. P. 25. 12 Johns. 1. Buller's opinion in Lowrie *v.* Bordieu. Courts of Law ought not to interfere to aid either party. They do not trust to *the Law* in making their contract : they trust to the stakeholder, and shold look to him alone.

HENDERSON, Judge, delivered the opinion of the Court:

We must draw the rules by which this case is to be decided, from other sources than those of moral justice. They flow entirely from the act of Assembly which prohibits the creation of any right on the event of a horse-race, and leaves the parties, as to any remedy, precisely where they were, if no such agreement had been made. And were it not that I am bound down by decisions, I should say that all money or other thing paid or delivered on any such event is still the property or right of the original owner. For it bears no analogy to a gift, where the property cannot be recovered back, although there is no consideration, but a delivery on a vicious consideration, which can give no right. But it is now too late to contend that money can be recovered back after it has been actually paid in discharge of an illegal wager.

In all the cases where money has been deposited with an agent or stakeholder, it has been attempted to retain it or to justify the delivery to the winner, upon the ground only of the possession of the stakeholder being the possession of the winner, and that there was nothing left for the loser to do: that as far as he was trusted, he had done all he had to do; thereby acknowledging the general rule, that until paid it was recoverable by the person who made the deposit. It appears to me extremely clear that as long as the money remains in the hands of the stakeholder, it belongs to him who has the "legal right;" and the legal right, which certainly was in the person depositing, when the deposit was made, cannot be divested out of him and placed in another by the event of an illegal wager. Rights cannot be divested and (462) created by such means. The fact is, it was once his, and nothing has taken place which in law has divested it. I need not examine authorities to prove these positions; the principles are admitted in all the cases, and it is quite possible in some they have been misapplied. The case in 7 Term Reports, 535,* is badly reported; the argu-

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*This was an action of assumpsit on an agreement made on the 14th January, 1797, by which the Defendant, in consideration that the Plaintiff had paid him 100*l.* agreed to pay him 300*l.* "if articles forming the basis of a peace, and signed by some official characters, by which hostilities would cease and would not recommence, were not settled between England and France on or before the 14th September, 1797." The declaration also contained the common money counts. On the trial at Westminster Sittings before Lord Kenyon, Ch. J. it was admitted that the wager was illegal, and that the Plaintiff could not recover on the special count; but, by the direction of the Judge, the Plaintiff obtained a verdict for the 100*l.* paid by him to the Defendant. A motion was made to set aside the verdict, and the Court of King's Bench refused to allow the motion; saying it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration, it may be recovered back again by the party who has thus improperly paid it, than by denying the remedy, to give effect to the illegal contract; and they referred to the case of Cotton *v.* Thurland, 5 Term Rep. 405.

ment of the counsel and the opinion of the Court do not fit the case stated, which is very clearly an action brought by the winner, not the loser, either against the party or the stakeholder ; for as against either he was clearly entitled to recover the 100*l.* the amount of his deposit, but not the 300*l.* the sum alleged to be won ; for on what pretence could either the loser or stakeholder retain it? I am only surprised that so plain a case should have engaged the attention of the reporter. In the case in East, it is taken for granted that if the money be not paid to the illegal claimant, it may be recovered back ; and it was insisted that giving him credit on the books of the broker, who effected the illegal insurance, was a paying over, or amounted to a payment; and therefore could not be recovered against the broker, who was the agent or the stakeholder of both parties. But it was said by the Court that it was no payment, and the Plaintiff recovered. (463) That case is much stronger than this, by reason of the credit entered on the books of the broker. We are well warranted in saying, that whilst the money is *in transitu*, before it comes to the actual possession of the winner by the directions of the loser to pay it over, after the event, or by his omitting to forbid the payment when he might if he thought proper, it is subject to be reclaimed by the person who made the deposit. The rule for a new trial must be discharged.

SHIPP *v.* M'CRAW.

From Wilkes.

A. charged B. with having stolen a note from him "in the county of Halifax, in Virginia." These words are actionable.

It was proved on the trial, that the stealing of a note was a larceny by the laws of Virginia, at the time to which the charge referred. *It would seem*, that the Plaintiff can recover without proof this fact—For

Although the crime may have locality, the effect of the imputation will follow a man wherever he goes; and therefore the law gives a remedy for imputations, which if believed, and even proved, cannot subject the accused to any future prosecution. As where a pardon is granted after the commission of the offence, but before the speaking of the words.

The *gavamen* in an action of slander, is social degradation, and not the risk of punishment: and the rule to test the question, whether the words be actionable or not, to-wit, Does the charge impute an infamous crime? is resorted to, to ascertain the fact, whether it be a social degradation, and not whether the risk of punishment was incurred.

And *this* rule is the test of *that*: for those who are punished for infamous crimes are degraded from their rank as citizens, they lose their privileges as freemen, their *liberam legem* and are no longer *boni et legales homines.*

This was an action of slander, and the slanderous words charged in the declaration were, "That Shipp had stolen a note from the Defendant, in the county of Halifax, in Virginia, and presented the note to J. Unthank, and tried (464) to draw the money. That if Shipp did not make a fair settlement with him, the Defendant, he would put Shipp in the Penitentiary: that he could, and would: that he had spoken to a Lawyer and was advised he could do so." It was given in evidence upon the trial, that the stealing of a note, as charged in the declaration, was a larceny by the laws of Virginia, at the time to which the charge referred. There was a verdict for the Plaintiff, and the presiding Judge sent the case to this Court for the opinion of the Judges, whether Plaintiff was entitled to judgment.

TAYLOR, Chief-Justice—The case states that it was given in evidence upon the trial, that stealing a note is larceny in Virginia; and we know that it is so in this State. Although it be true, that for such a larceny committed in Virginia, a man could not be liable to punishment here, yet to impute that crime to a man, tends not less to his degradation and loss of cast in society, than if it exposed him to a prosecution. A person cannot escape from the odium and disgrace fixed upon his character by the charge, because he is no longer in the state where he is punishable: for although the crime may have locality, the effect of the imputation will follow a man wherever he goes. It would seem to be a great defect in the law, if words which are so calculated to injure a man's character, should cease to be actionable, because the slanderer added something to them which shewed that the Plaintiff was not liable to prosecution in the State where the words were spoken. Such a principle would tend most effectually to withdraw from character the protection which the law now justly affords it; and would operate most injuriously in the United States, where the people are frequently seeking new settlements, with a view of improving their fortunes, when a fair character is not unfrequently the most cherished portion of the capital they bear with them. Fortunately the law does (465) not sanction such a doctrine: for the books furnish many cases of unquestionable authority, in which a remedy has been given on account of imputations, which, if believed, and even proved, could not subject the Plaintiffs to any future prosecutions.

In Caddington *v.* Wilkins, Hob. 81, a pardon was granted after the commission of the offence, but before the speaking of the words; and the Plaintiff was held entitled to his action.

In Carpenter *v.* Tenant, Rep. Temp. Hard., 339, the Defendant said, "Robert Carpenter was in Winchester jail, and tried for his life, and would have been hanged had it not been for Liggett, for breaking open the granary of Farmer A. and stealing his bacon."

In Gainsford *v.* Tuke, Cro. Jac., 536, the words were, "Thou wast in Lancaster jail for coining" The Plaintiff replied, "If I was there, I answered it well enough." "Yea," said the Defendant, "you were burnt in the hand for it."

In Boston *v.* Tatham, Cro. Jac., 622, the action was brought for saying, the Plaintiff was a thief and had stolen the Defendant's gold. It was contended in arrest of judgment, that the words not being certain as to time, they might be taken to refer to the time of Queen Elizabeth, since which there had been divers general pardons, in which case no loss could happen from the scandal. But the Court said, it is a great scandal to be once a thief; and that although a pardon may discharge the punishment, yet the scandal of the offence remains.

In neither of the preceding cases, could the Plaintiff have been liable to a future prosecution: for in one he had been pardoned, in another acquitted, and in another punished. And in Boston *v.* Tatham, the Court expressed an opinion, that even allowing that the words fixed the offence to a period, since which the liability to the punishment must have been discharged by a general pardon, yet that the words were actionable, as the scandal of the offence remained. The same doctrine has been affirmed in the Supreme Court of New York, where it was held that an action of (466) slander would lie for charging the Plaintiff with a crime committed in another State, although the Plaintiff would not be amenable to justice in the State where the words were spoken. 14 Johns. 234.

I am very clearly of opinion that the words laid in this declaration, accompanied with the proof made in the case, that they imputed a crime amounting to larceny in Virginia, are actionable; and consequently that the Plaintiff is entitled to judgment.

Henderson, Judge.— I concur in the opinion delivered by the Chief Justice. The *gravaman* in an action of *slander* is *social degradation.* The risk of punishment, and the rule to test the question whether the words be or be not actionable, to-wit: does the charge impute an infamous crime, is resorted to, to ascertain the fact, whether it be a social degradation, and not whether the risk of punishment be incurred. And this rule is the test of *that;* for those who are punished for infamous crimes are degraded from their rank as citizens, they lose their privileges as freemen, their *liberam legem,* and are no longer *boni et legales homines.* No other degradation will give an action, for no other degradation is a social loss; and it matters not where the offence be charged to be committed, or what may be the laws of a foreign country, where the act is charged to have been done. The words were spoken here of a man under the protection of our law. The *gravaman* is the loss of character *here,* and the transaction shall be judged of by our law, the *lex loci.*

The cases (which are numerous in our books) where the words impute a crime, and at the same time state a pardon or acquittal, fully prove that the degradation, and not the danger of punishment, is the basis of actions of slander. This ground is also fortified by the precedents. The complaint there, is always for loss of character, and not the danger of punishment; nor is it ever charged that (467) the Defendant alleged the criminal act to be committed in this or any other particular government; only that the words were spoken at some place within the jurisdiction of the Court, merely to give a *venue* for their trial, if denied. And it is a maxim, founded on common sense, that you need not prove more than you ought to state; but you must prove every thing which you ought to state: for the pleadings are nothing but the alleged legal facts. As it is not required to be stated that the Defendant imputed the commission of a crime within the government, it is not required to be proven. It is, therefore, quite an immaterial circumstance. I am of opinion that judgment should be given for the Plaintiff.

Hall, Judge, contra.—No special damage is charged to have been the consequence of speaking the words charged in the declaration: they must, therefore, be words actionable in themselves, or the Plaintiff is not entitled to judgment, although the evidence on the trial established facts, which, had they been inserted in the declaration, would have clearly made out his case.

Words, in themselves actionable, are such as would, if true, bring a man into danger of legal punishment. At Common Law, to charge a man with stealing bonds, bills, notes, &c. which concern choses in action, was not actionable, because they were such goods that larceny could not be committed of them. In this State, the Common Law continued unaltered in that respect until the act of 1811, ch. 11, was passed, which act declares the stealing of bonds, bill, notes, &c. to be a felony. Since the passage of that act, it is as actionable to charge a person with stealing that species of property as any other.

In England, formerly, to charge a person with being guilty of an act of witchcraft, was to charge him with a capital crime: but since it has been declared by statute to be no offence, to make that charge against an individual is not actionable.

In the present case, the Plaintiff is charged with (468) having stolen the note in the State of Virginia; but whether or not the stealing of a note in that State was an offence or not, the declaration does not set forth. If the Legislature of that State have passed no law making it an offence to steal a note, to charge a person with stealing one is not actionable. If there be such a law, it ought to have been stated in the declaration. The Court *ex officio* cannot take notice of it. 1 Chitty's Pleadings, 221, and the cases there cited. It matters not that that fact was proved on the trial: whether the Plaintiff has a good cause of action or not, must appear from a view of his declaration.

HARDY WATFORD *v.* JAMES PITT.

From Bertie.

A father being indebted, but not beyond his ability to pay, made a parol gift of a slave to his son, then two years old. He then paid his debts, and sold the slave. The purchaser had express notice of the gift, and declared, before he purchased, that he would not on that account give the full value.

The gift, not being in writing, is void as to creditors and purchasers. The case of M'Cree *v.* Houston, decided at this term, governs this case.

This was an action of trover for a negro slave named Stephen. It was proved on the trial that about twenty years before, Stephen was given by parol by John Watford to his son, the Plaintiff, who was an infant aged one or two years. A formal delivery of the slave was made, and persons were called to witness it. At the time of the gift the father was indebted, but not beyond his abitity to pay. He remained in Bertie about two years after the gift, and then removed to Edgecombe, taking with him the Plaintiff and the slave. Previous to his removal he paid his debts, and two (469) years afterwards sold the slave to one Isham Holloman, who had express notice of the gift; and, before he purchased, he declared, in the presence of a witness, that on that account he would not give the full value. Holloman remained in possession of the slave till his death, when the slave came to the possession of the Defendant, who was guardian of Holloman's children. There was a verdict for the Plaintiff; and a rule for a new trial being obtained by the Defendant, the same was sent to this Court; and

HALL, Judge, delivered the opinion of the Court:

The case of M'Cree *v.* Houston, decided at this term, governs this case. Indeed, if there could be a difference between the two cases, it would be against the present Plaintiff; because, after the parol gift to him, the father retained possession of the slave until the sale to Holleman. But in Law there can be no difference. The same reasons that governed the Court in deciding for the Defendant in M'Cree *v.* Houston, compel them to say that a new trial ought to be granted in this case. The verdict rendered was against Law, as the gift to the child was not by deed, and on that account void against creditors and purchasers under the act of 1784, ch. 10. It is not material that Holloman did not pay the full value of the slave: if he paid nearly the value, it is sufficient. He probably retained as much as would remunerate him for the trouble of defending a suit. Let the rule for a new trial be made absolute.

(470) WILLIAM AINSWORTH *v.* JOHN M. GREENLEE.

From Burke.

A constable offered for sale, under an execution, divers goods locked up in a room, without shewing them to the bidders. The sale is void.

The law requires the sale to be conducted in such a way as is most likely to make the property bring the highest price. The bidders ought to have an opportunity of inspecting the goods and forming an estimate of their value. The goods ought also to be present, that the officer may deliver them forthwith to the purchasers.

The Defendant owned a house in the county of Burke, having sundry apartments, one of which he had leased to James W. Edwards. Sundry persons having obtained judgments against Edwards, executions were sued out, and on the day on which his property was advertised for sale, the Plaintiff, William Ainsworth, settled one of the executions, amounting to 120 dollars, or thereabouts, in some way satisfactory to the Plaintiff in that execution; and all the other executions, except one for 19 dollars, in favor of Hopper, were compromised between Edwards and the Plaintiffs in said executions. The constable set up a mare for sale to satisfy the execution of Hopper, and a bid of five dollars was made. The sale of the mare was cried for some time, when the constable said, he also set up with the mare a quantity of goods which were locked up, upstairs of the apartment leased to Edwards, the sale being made before the door of the house. The goods were not shewn, nor were they examined nor particularly described. Ainsworth, the Plaintiff, bid 20 dollars. The sale was immediately closed, and he was declared by the constable to be the purchaser. The goods were of the value of 150 dollars, and the mare of 40 dollars. Edwards was insolvent, and indebted to other persons besides those who had executions against him.

After the sale, the constable went up stairs, unlocked the room, and, taking the goods piece by piece, delivered them to Ainsworth. They were left in the room; and some (471) days thereafter, Ainsworth aplied for the goods, when Greenlee refused to let him have them. Ainsworth demanded the goods, and, upon Greenlee's refusing to deliver them, (he admitting that they were in his custody,) Ainsworth brought this action of trover to recover their value.

The Court charged the Jury that the sale under which Ainsworth claimed the goods was void; because the goods were not shewn at the time of the sale, nor before the sale, to the persons attending. There was a verdict for the Plaintiff; and a rule was obtained for a new trial upon two grounds: 1st. Of misdirection by the Court; 2d. That if the sale were void, yet that Ainsworth was entitled to recover upon the *delivery* made to him of the goods by the constable. The rule was discharged, and the Plaintiff appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The constable's authority to sell these goods was derived under a *fieri facias;* the execution of which the law requires to be done in such a manner, as that by the sale, the property is most likely to command the highest price in ready money. It is evident, that for this purpose, the bidders ought to have an opportunity of inspecting the goods, and forming an estimate of their value; without which it is not to be expected that a fair equivalent will be bid. The presence of the goods too, in the possession of the officer, to which possession the levy gives him a right, assures the bidders that a delivery will be made to the highest forthwith; and that so far the object of the purchase will be attained without litigation. Here, however, the goods were sold without being exhibited to the bidders, and while they were actually locked up in an apartment of the house. This was such an abuse of authority in the constable as was calculated either to sacrifice, at under value, the property of an honest De- (472) fendant, or to subserve some purpose of collusion between a knavish one and the purchaser. One of these ends must have been effected in this case, where property has been sold for one tenth of its value. There is much justice and security in the rule established by the decisions heretofore made, requiring the presence of chattels when they are sold by the sheriff or constable; and those cases ought to be followed. The rule for a new trial must be discharged.

(473)

GEO. LANE *et al.* *v.* DANIEL PATRICK AND RUFFIN GRANGER.

From Craven.

Husband and wife being seised of a tract of land in right of the wife, agreed to convey the same in fee simple to a purchaser for a fair consideration; and, in pursuance of this agreement, they conveyed by deed the tract of land to the purchaser, who executed his bond for the purchase money. The husband died, and the wife not having been privily examined touching the execution of the deed by her during her coverture, availed herself thereof, entered on the land, expelled the tenant who held under the purchaser, and avoided the estate. The purchaser died, and his administrator filed a bill praying to have the payment of the purchase money injoined. Demurrer to the bill overruled; for

The purchaser contracted for the wife's estate of inheritance, not for the husband's freehold in her right. He obtained a conveyance, which transferred only the husband's estate. To make it good to pass the wife's estate, her private examination was necessary.

The nature of the contract, and the transfer in its incipient state, shew, that the agreement of the parties was, that a conveyance effectual to pass the property agreed to be sold should be made. It is, therefore, unlike the case where the parties have done what they have stipulated to do; as where the agreement was, that the transfer should be without warranty, and such transfer was made, and the title proved defective; the purchaser could not complain that the vendor had not done what he had promised to do.

The Court will therefore apply that universal principle of Equity, which forbids one party to take the benefit of a contract, whilst he withholds performance on his own part; and will arrest the money until he shall have performed it.

The deed must be considered as unexecuted for the purpose of having the effect intended; as an instrument sealed, but not delivered, where individuals under no incapacity to contract are the parties. For as the Common Law has declared a delivery necessary to constitute a deed between such parties, the General Assembly have declared a private examination of a married woman necessary to make her deed effectual to pass her lands.

This was a bill filed in the Court of Equity for Craven County by George Lane, administrator of the estate of Charles Jones, deceased, and by Lewis Jones and others, heirs at law of the said Charles. The bill charged that George W. (474) Daniel and Sarah his wife, being seised in the right of said Sarah of a tract of land situate in the county of Lenoir, and containing seventy-five acres, agreed to convey the same in fee simple to one Charles Jones, in consideration of four hundred dollars, one half of which was to be secured to one Silas Jones, an illegitimate son of the said Sarah Daniel, and the other half to the said George W. Daniel. That in pursuance of this agreement, George W. Daniel and Sarah his wife, by deed conveyed to the said Charles

Jones the tract of land in fee simple; and the said Charles Jones executed two obligations with Tally Moseley, his surety, each for the sum of two hundred dollars; one payable to George W. Daniel, and the other to Daniel Patrick, guardian of the said Silas Jones. That Charles Jones soon after died intestate, leaving the complainants, Lewis Jones and others, his heirs at law and next of kin; and administration upon his estate was granted to the complainant, George Lane. That the obligation given to G. W. Daniel had been paid by the said administrator, who, being desirous of closing his administration, and not doubting that the other obligation given to Patrick for the benefit of said Silas Jones was to be paid out of the assets of his intestate, gave his own bond, with Tally Moseley his surety, to the said Patrick as guardian for Silas Jones, in lieu of the obligation of his intestate, which was thereupon given up to the administrator, and the amount thereof charged by him to the account of his administration, and the distributive shares of the next of kin thereby diminished.

The bill then charged that George W. Daniel died, leaving the said Sarah, his widow, surviving him; and that she, never having been privily examined touching the execution of the said deed by her during her coverture, availed herself thereof, and entered on the said tract of land, and expelled the tenant, who held under the said Charles Jones, and avoided the estate, and continued possessed thereof until her death: whereupon the same descended to her heirs at law.

That Silas Jones, being apprised of the circumstances, disclaimed any right to enforce the payment (475) of the administrator's bond; but died soon after arriving at age, and administration upon his estate was granted to Ruffin Granger, who had instituted suit upon the bond, and recovered a judgment in the name of Daniel Patrick, to whom the bond was made payable. The bill prayed for an injunction, which was granted; and the Defendants filed a general demurrer to the bill. The presiding Judge sent the question arising on this demurrer to this Court; and the Judges here were divided in their opinions. Henderson and Hall being of opinion that the demurrer should be overruled; Taylor, Chief Justice, contra.

HENDERSON, Judge.—The purchaser contracted for the wife's estate of inheritance, not for the husband's freehold in her right, and has obtained a conveyance which (to make the most of it in its present form) transferred only the husband's estate; but might, by the private examination of the wife, have passed also her interest. And no doubt can exist, but that the agreement of the parties was, that a conveyance effectual to pass the property agreed to be sold should be made. This is evidenced not only by the nature of the contract, but by the transfer in its incipient state. It is, therefore, entirely unlike the case where the parties have done what they stipulated to do:—As in the case of a sale of lands where the vendor has made a transfer: Although he may have transferred a defective title, the vendee cannot complain that the vendor has not done what he promised to do. If there was to be no warranty, the vendee has got what he contracted for, and it was his fault or misfortune not to take one. If he was to have a warranty and has one, still he cannot complain that the contract had not been executed, although the vendor's title was not good. I feel bound, therefore, to apply that universal principle of Equity, which forbids one party to take the benefit of a contract, whilst he entirely withholds performance on his own part; and to arrest the money until he shall have (476) performed it. For I look upon the deed in its present dress, as unexecuted for the purpose of having the effect intended; as an instrument sealed, but not delivered, where individuals under no incapacity to contract, are the parties. For as the Common Law has declared a delivery necessary to constitute a deed between them, the General Assembly have declared a private examination necessary to make a deed, or an effectual deed (which is the same thing) from a married woman, to pass her lands. The rule in each case flows from the same source, the legislative will, although evidenced in a different manner.

As to the bond being payable to the wife's son, or in trust for him, it makes no difference. He is a mere volunteer, and must stand in place of the vendor. The renewal of the bond by the administrator of the purchaser to the same person, does not alter its original nature. In Equity it is the same: each given upon the same consideration, and liable to the same rules of equity. The demurrer must be overruled, and the Defendants answer.

TAYLOR, Chief Justice, contra.—I regret my inability to concur in the opinion of my brothers; because it best accords with my private sentiments of natural justice, that a purchaser should be relieved against the payment of the price of the land, from which he has been evicted through a defect of title. But not being able to arrive at such a conclusion by my view of the law, the wisdom of which I am bound to consider superior to any man's wisdom, I will state concisely the grounds of my dissent.

An injunction has been granted in this case, to stay a judgment of law, recovered under the following circumstances. Daniel and his wife executed to Charles Jones a deed for a tract of land, of which the wife was seised in fee, for the price of four hundred dollars; to secure which sum, two bonds were given by Jones, with Moseley his security, each for two hundred dollars; one payable to Daniel Patrick, guardian of Silas Jones, a natural son of Daniel's (477) wife, for the benefit of said Silas; and soon afterwards, Charles Jones, the purchaser, died. The bond given to Daniel has been taken up by Lane, the Complainant, who administered upon Charles Jones' effects. Lane gave his own bond to Patrick, in lieu of the intestate's bond; and upon that bond, suit has been instituted against Lane, by the administrator of Silas Jones, who died soon after arriving at full age. Upon the death of Daniel, his widow never having been privily examined according to the act of 1751, entered upon the land, so sold by her husband and herself, expelled the tenant placed on it by Charles Jones, and soon afterwards died seised; whereby the land descended upon her heirs The consideration of the bond having thus failed, Lane, the administrator of Charles Jones, together with the heirs at law of the latter, seek to be relieved from judgment. The Defendants have demurred to the bill.

No doubt can exist as to the legal operation of the deed from Daniel and wife. He acquired by the marriage, a freehold interest in the land during the joint lives of himself and his wife; and the only effect of the deed was to convey to Charles Jones, such estate as Daniel had. The execution of the deed by the wife was a nullity in respect to her right, unless the course, which the law has prescribed, had been pursued, to ascertain her consent. Though Daniel's right only was in reality conveyed by the deed, yet it *purported* to operate upon the fee simple of the wife, whilst Daniel endeavored to convey as much as by law he could do. This was the subject of the contract, and it is to be presumed that the purchaser was aware of the ulterior steps necessary, to render the deed obligatory upon the wife. Without even looking into the title, there were plain and notorious facts, sufficient to satisfy any purchaser, that Daniel was about to sell his wife's land: the deed was drawn in the name of the husband and wife; she was called upon to execute it, and one half of the purchase money was made pay- (478) able to her natural child. Here, then, was a full disclosure of the title which Daniel was about to sell; and fair notice given to the purchaser of what was necessary to its confirmation. There is not the slightest ground to impute to the seller, either fraud, misrepresentation or concealment.

Under this statement of facts, I apprehend that the purchaser could have had no remedy at Law. He had a right to ask for a warranty, or for covenants against all persons claiming title to the land; and if he chose to take a deed without that safeguard, the rule of *caveat emptor* must prevail. The case of Bree *v.* Holbeck, in Douglas, 654, shews, that where there is no fraud, the purchaser is without remedy at Law, unless his covenants provide it; and in Cripps *v.* Reade, 6 Term Rep. 606, the distinction is taken between those cases, where money paid on a consideration which has failed, may be recovered back, and where it cannot, excluding the cases where a regular conveyance has been made, to which other covenants were not to be added. "With the exception of a vendor or his agent suppressing an incumbrance or a defect in the title, it seems clear that a purchaser cannot obtain any relief for any incumbrance or defect to which his covenants do not extend: and, therefore, if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he is without a remedy. It has ever been held, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of the purchaser; because he might have looked into the title; and there is no reason he should have an action by the Law, when he did not provide for himself." Sugden's Letters, 35.

The privy examination is substituted for a fine, in which also the wife is privily examined touching her consent; and where a husband conveys his wife's estate in England, it is the ordinary form of the conveyance, to contain a (479) covenant on his part that the wife shall pass a fine. The proper covenant here would be, that the wife shall submit to a privy examination. It was once the practice of the Court of Equity to decree a specific execution of a covenant to levy a fine; but it was very absurd to compel a married woman to levy a fine, when the efficacy of the conveyance is derived from her having done it voluntarily. Such a practice is therefore abandoned; but the purchaser has still a remedy at Law, by an action of covenant against the husband. 1 Bos. and Pull. N. P. 267.

It is also laid down in the authorities that Equity proceeds on the same principle with the Law, unless there be fraud in concealing the defect of the title. In proof of this, the strong case of *Urmston* v. *Pate* is cited, in 3 Cruise, 91. In the more recent case of Wakeman *v.* Rutland, in 3 Ves. Junr. 234, the Lord Chancellor observes, "As to the extent of the covenants, there was a case about three years ago. An estate was bought; as to one moiety, there was a clear defect of title, which the covenant of the purchaser had overlooked. He was evicted of one moiety. He filed a bill in Equity, asserting a claim to be repaid a moiety of the purchase money. He had taken his conveyance with the common covenants; the eviction was not within the covenants. I felt the hardship, but thought I could not raise an Equity, where there was no covenant to warrant the title." It is held that the possession of the land is no evidence of title, and no person in his senses would take an offer of purchase from a man merely because he stood upon the ground. The purchaser must look to his title, and if he do not, it will be gross negligence. 13 Ves. 114. To sustain the bill, is, in my apprehension, to alter and extend the agreement of the parties, not to enforce it, and to sanction a principle which goes the whole length of permitting the recovery back of the money which has been paid in the case, and in every other, where the contract has been executed.

(480) THE STATE *v.* SARAH JEFFREYS.

From Caswell.

Indictment against a woman for murdering her base born child, charged that she, "with force and arms, feloniously, wilfully and with her malice aforethought, did make an assault, and with both her hands about the neck of the child then and there fixed, the said child did feloniously, wilfully and of her malice aforethought, choak and strangle, of which choaking and strangling the said child then and there instantly died." The prisoner being convicted, it was urged as a reason why sentence of death should not be pronounced, that the evidence proved, if the child had been killed by the mother, the manner of the death was different from that charged in the indictment, and was produced by blows, and not by choaking and strangling.

Reason overruled; for what the evidence proves is peculiarly the province of the Jury to determine. The Court has nothing to do with it; nor can the Court grant a new trial, because the Jury have found contrary to evidence.

The statute of 21 Jac. 1, ch. 27, being repealed by the General Assembly, if a Judge, in his charge to the Jury, gives to the concealment of the birth of a base born child the weight given to that fact by the statute of Jac. a new trial should be granted.

The Defendant was indicted for murder: and the indictment charged, that, "she, being big with a female child, did by the Providence of God bring forth the said child alive of her body, alone and in secret, which female child so being born alive, by the laws of this State, was a bastard; and that she not having the fear of God before her eyes, but being moved and seduced by the instigation of the Devil, afterwards, to wit: on the same day and year aforesaid, soon after the said female child was born, with force and arms in the county aforesaid, in and upon the said female child, in the peace of God and the State then and there being, feloniously, wilfully and of her malice aforethought, did make an assault, and that the said Sarah Jeffreys, with both her hands about the neck of the said female child then and there fixed, the said female child then and there feloniously, wil- (481) fully and of her malice aforethought, did choak and strangle, of which said choaking and strangling, the said female child then and there instantly died." The Defendant was found guilty; and it was urged why sentence of death should not be pronounced against her, that before the trial of Defendant the statute of 21 Jac. 1, ch. 27, which made the concealment of the birth of a bastard child, evidence that the child was born alive, had been repealed by the General Assembly; that the evidence in the case (a transcript of which formed part of the case) shewed that the manner of the death was different from that charged in the indictment; that the evidence, if it proved a killing at all, proved a killing by a stroke or blow, and not by choaking or strangling. These objections were overruled by the presiding Judge, and the Defendant appealed.

HENDERSON, Judge, delivered the opinion of the Court:

The first exception is, that the statute of James was repealed before the trial. The Defendant was indicted upon no statute, but for the Common Law offence of murder. The statute of James creates no offence, but gives to certain circumstances mentioned in the statute a legal weight and import which they did not possess before, and throws the burthen of proof that the child was born alive on the mother. Thus far did the statute go, and no further. But could we perceive from the record that the Judge, in his charge to the Jury, directed them to give to those circumstances the weight given by the statute, (the statute being repealed by our Legislature after the offence and before the trial,) we should not hesitate a moment to grant a new trial, but it does not appear that such was the case.

It is next alleged, that the evidence of the manner of killing does not comport with the charge: that the charge is a killing by choaking and strangling, and the evidence proves a stroke or beating. What the evidence proves is (482) peculiarly the province of the Jury to say. With this, the Court has nothing to do; nor can the Court grant a new trial because the Jury had found contrary to evidence. It is true, it was the duty of the presiding Judge to inform the Jury that the kind of death laid must be proved; that a poisoning did not support a charge of beating or of strangling, or *vice versa*. But whether the evidence offered proved the one or the other, was a question of fact solely for the Jury. What the Judge did in this case does not appear; and if anything is to be taken by presumption, it is to be presumed that he did his duty. We can, therefore, see no reason why a new trial should be granted, or the judgment arrested. There must be judgment of death against the Defendant, which the presiding Judge of Caswell Superior Court will pronounce.*

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* The case of Sarah Jeffreys furnishes another instance of the difference of opinion which men will form of the same transaction, even upon the same evidence, at different times. She was tried a few months after the death of her child, and whilst the prejudice, which a charge of murder never fails to create against the person accused, was in full force.

(483)

BARTHOLOMEW BARROW *v* DAVID PENDER, Sen.

From Halifax.

Upon a marriage of his daughter in 1805, her father put into her possession a slave. In 1807, he purchased a tract of land for his son in law and family to reside on (the son in law having become nearly insolvent), and sold the slave to pay for the land. The son in law died, and in 1809 the father sold the land. His daughter complained: he answered that he would build her a house, and let her have another slave. He put into her possession another slave, and she married, and her husband sold the slave. The purchaser is not entitled to the slave as against the father; for

The daughter must be considered either as a donee or a purchaser. If she claimed under a gift, it not being in writing, is void by the act of 1806. She could not claim as a purchaser, because the first slave sold by her father, and by her consent, to pay for the land, was the slave of her first husband. She paid nothing to her father for the second slave.

She could not claim upon the ground of a compromise of a doubtful right, for there was no subsisting right in her or her father. In the cases of compromise of doubtful rights, there is a distinct and intelligible right in one of the parties, and the effect of the compromise is to end a dispute which must otherwise terminate in litigation.

This was an action of detinue for negro slaves; and the leading facts of the case were as follows: The Defendant had a daughter, who married one Williamson. He was a man of bad character, and insolvent; and having gone to Tarborough to follow his trade, his wife went to live with him at that place in the year 1805, taking with her a negro slave belonging to her father. Williamson remained in possession of the negro till some time in 1807, when he and his wife left Tarborough, and went to reside near the Defendant; when the Defendant purchased a tract of land to settle them on, and, to pay for this land, he sold the negro. Williamson died, and his widow continued to reside on the land till 1809, when the Defendant sold it. At the time of the sale, Mrs. Williamson reproached the Defendant, her father, with

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Elizabeth Combs was indicted as an accomplice in the murder, and convicted also: but the Court granted a new trial; and at the Court where sentence of death was pronounced upon Sarah Jeffreys, her trial again came on, and the evidence was given at length. This was twelve months after the conviction of Sarah Jeffreys, when prejudice had died away, and the whole case could be examined without feeling. Upon this trial the Court and the Jury were of opinion that the evidence scarcely afforded a presumption of guilt in the principal, and, of course, the accomplice was acquitted. A representation of the case was made to his excellency Governor Branch, who granted a pardon.

injustice towards her: said to him that he had taken (484) away the negro that he let her have, and sold it for the land, and the deed was taken in his name to prevent its being liable for Williamson's debts. To these reproaches, the Defendant replied, that a negro would suit her better than the land; that she could not cultivate the land herself, and she had no one to labor for her; that he would give or let her have the slave (naming her), who was the mother of those in question, and to remove her to his own house, and have a house built for her. Soon afterwards Mrs. Williamson was removed to a house in the Defendant's yard, and had the possession and use of the slave. She then married Waller, and on the morning following the marriage, the Defendant called up the slave, and in presence of witnesses declared that Waller might take her home upon loan, subject to the demand of himself or his representatives. At this time no claim was set up by Waller or his wife, both being present. Waller continued in possession of the slave for several years, and becoming indebted to divers people, he was sued, judgments had against him, and executions issued, which were levied on the slave and her children, and at the sale the Plaintiff became the purchaser. Some time before the sale, Waller executed a bill of sale to the Plaintiff for the slaves, in consideration of money which the Plaintiff either had paid or was bound to pay for him. The Defendant gave notice to the Plaintiff before his purchase under the executions, that Waller held the slaves only upon loan. Waller lived with the Plaintiff, and sometimes one and sometimes the other had possession of the slaves for more than three years.

For the Plaintiff it was insisted, that Mrs. Williamson was to be regarded as a purchaser of the slave, (the mother of those in question.) That she had a claim to the land in part purchased with the negro slave first put into her possession after her marriage with Williamson; that at that time (previous to the act of 1806) the law regarded this putting of the slave into her possession as a gift; that she (485) asserted her claim to the land when the Defendant was about to sell it, and had agreed to abandon her claim in consideration of the promise of the Defendant to let her have the slave, the mother of those in question; that the Defendant let her have the slave in pursuance of this promise; and the Court was requested to instruct the jury, that if they were of opinion, from the evidence that this was the history of the transaction, and that the slave was given in satisfaction of what Mrs. Williamson thought herself entitled to, and with a view of making peace in the family, they should find for the Plaintiff. The Court declined giving such instructions to the jury, who found a verdict for the Defendant; and a rule for a new trial being obtained, the Court discharged the rule, and the Plaintiff appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: From the circumstances of this case, the Plaintiff can make out a right to the slaves in dispute, only by establishing such a transfer from Pender to his daughter as would be valid since the act of 1806. Unquestionably it cannot prevail as a gift, because it was not in writing, as that act requires. It is alleged, however, by the Plaintiff, that Pender passed the slave to his daughter as a compensation for a tract of land sold by him, on which she lived, and which land had been purchased with a slave that he had formerly given to her, but had taken away to pay for the land; that the slave now in question was given to the daughter in satisfaction of what she might think herself entitled to, and with a view of making peace in the family; and that the compromise of a doubtful right is a sufficient foundation on which to decree the specific execution of an agreement. But the act of 1806 must bear on this transaction, unless it can be shewn that the slave was *sold* to the daughter. A sale implies a valuable consideration, as money or the like: it cannot exist without a valuable consideration; though the law establishes free (486) gifts without the same. Noy's Maxims, 87. Hob. 230. A consideration ought to be matter of profit and benefit to him to whom it is done, by reason of the charge or trouble of him who doth it. Cro. Car. 8. What profit or benefit could the father derive from the agreement of the daughter?

Assuming as a fact that this slave was transferred in the manner alleged by the daughter in the conversation with her father, still the first negro was given to her, if given at all, while she was the wife of Williamson, in whose possession the slave was, while he was at Tarborough. Upon his death, therefore, the right devolved upon his administrator, and his wife had no claim except under the statute of distributions, from the surrender of which to the father he could derive no benefit, since it could not repel the right of Williamson's representatives.

The compromise of a doubtful right recognises a subsisting right in one or the other of the contracting parties. Here it was in neither. The gift of the father, if ever made, divested him of the right, and the same act placed it in Williamson. In the cases of compromise of doubtful rights, there is a distinct and intelligible right in one of the parties, and the effect of the compromise is to end a dispute, which must otherwise have terminated in litigation. In every view of the subject, the Court is of opinion that the Jury were properly instructed, and the rule for a new trial must be discharged.

(487) THE STATE *v.* WILLIAM SPARROW.

From Orange.

The Jury being charged in a criminal case, a motion was made that the witnesses in support of the prosecution should be sworn and sent out of the hearing of the Court. A similar motion was made as to the Defendant's witnesses. The motions being allowed, the witnesses were sworn and sent out. After they were all examined, a motion was made by the Solicitor-General, that he have leave to introduce as a witness a person who had been in Court and heard the examination of the other witnesses. The motion allowed; for

Although, by the Common Law, the Crown could claim as a matter of right that the witnesses for the accused be examined in the absence of each other, yet no such right was allowed to the accused as to the witnesses against him. In this State, no privilege is allowed to the State which is denied to the accused, and any rule as to the examination of witnesses must work both ways.

The Constitution having declared that every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, this right is not forfeited, if, either through inadvertence or design, he omit to call his witnesses when directed to do so. Such also is the rule as to the State. The Court can only propose a separation of the witnesses; it cannot compel either party to call in witnesses, until the time comes, when, according to the rules of the Court, the party may call on them to be examined.

It is true the right thus secured, must be claimed at the proper time and stage of the trial; and that is, as to the accused, when he is called on to make his defence and offer his witnesses and proofs.

The Courts may furnish rules to carry the law into execution, but not to prevent its execution. They cannot, by their rules, exclude a party from a right, when that right is asserted at the time and in the manner contemplated by the law which gives that right. The rule must work for the State as well as the accused.

The Court will not grant a new trial, because the Jury took refreshments after they retired, unless it appear those refreshments were furnished by the party in whose favor they have rendered their verdict.

The Defendant was indicted for the crime of murder in Orange Superior Court, and at the trial, after the Jury were charged, the counsel for the Defendant required that all the witnesses on the part of the State should be sworn and sent out of the hearing of the Court; and the Solicitor- (488) General made a similar motion respecting the witnesses for the Defendant: both of which motions were allowed by the Court, and sundry witnesses were sworn on each side and sent out. After the evidence had been closed on the part of the State and the Defendant, the Solicitor-General moved for leave to swear another witness, who had been present in Court during the whole trial, to prove that the prisoner had fled from persons who went to arrest him, after the deceased died. This motion was objected to on the part of the Defendant; but the objection was overruled by the Court, and the witness was sworn and examined; and, on his examination, proved the fact of flight To this opinion of the Court the counsel for the Defendant excepted.

The Jury found the Defendant guilty, and the counsel for the Defendant moved for a new trial upon two grounds; 1st. Of error in the Court in allowing the last witness to be sworn and examined; 2d. Of improper demeanor by the Jury during their retirement. And the facts disclosed to the Court by affidavits upon this point were, that the Jury retired under the charge of an officer duly sworn, on Friday evening the 24th September. and returned their verdict on the next morning about ten o'clock: during their retirement, and whilst they were consulting upon the verdict they should render, sundry persons were seen at the windows of the room in which they sat, at different times, in conversation with the Jury: that between the hours of seven and eight o'clock, on Saturday morning, a negro boy belonging to one of the Jury was seen to carry a vessel containing victuals, covered with a white cloth, to the window, and hand it to one of the Jury: a short time afterwards, the same negro boy was seen to hand in to the Jury a vessel containing coffee; and, after the Jury had rendered their verdict, there was found in their room, with the aforesaid vessels, another containing some wine.

The Court refused to grant a new trial, and pronounced judgment of death against the defendant, who appealed to this Court.

TAYLOR, Chief-Justice.—It is said in the books that (489) the Crown may demand that the witnesses should retire in order that each may be examined in the absence of the others; and that the same order will be made on the request of the Defendant, as a matter of indulgence, but not of right. It is probable that the difference arose from the practice of not suffering witnesses to be sworn against the King upon indictments for capital crimes; and, anciently, from the prisoner's not being permitted to call witnesses at all. A criminal trial was formerly considered an inquisition on the part of the Crown, wherein the Jury were to decide upon the prisoner's guilt or innocence, according to the evidence offered in *support* of the prosecution: and this practice was not entirely abolished till the reign of Queen Mary. 4 Bl. Com. 359. 3 Inst. 70. The rights of the prisoner were in practice circumscribed within narrow limits; though Lord Coke says, "he never read in any statute, ancient author, book, case or record, that in criminal cases the party accused should not have witnesses sworn for him; and, therefore, that there is not so much as *scintilla juris* against it." Whatever may be the origin of the practice of sending out the witnesses for the prosecution, I am of opinion that usage has, here at least, matured it into a right, which ought to be preserved with equal care for the State and the accused. The object of it is the ascertainment of truth, and the detection of a previous concert among witnesses, to impute guilt to an innocent man, or to screen a guilty one, from the penalty of the law. The interests of public justice will be best consulted by allowing no advantage to the State, which is not enjoyed by the accused, whom the law regards as innocent until he be convicted. I can perceive no safe medium between receiving it as a right, or abolishing it altogether. If it be understood that it is accorded to the prisoner as a matter of indulgence, and, therefore, that a punctual observance of it shall, in the event of his conviction, be dispensed with, a temptation to abuse will be offered to witnesses and (490) prosecutors, the effect of which cannot always be counteracted by the utmost vigilance of the law officers of the State. If, however, the rule is to be departed from in any case, it ought to be upon some special reason shewn to the Court upon affidavit, and not as a matter of course upon motion. Considering the subject in this light, I am disposed to believe, *in favorem vitæ,* that the first ground relied upon is sufficient for a new trial.

With respect to the other reason, the law appears to be well settled that if a Jury take refreshment before they be agreed, at the charge of the party for whom they find a verdict, it shall be avoided. Co. Lit. 227, b. The fact of the Jury taking refreshment is shewn by the affidavits, but it does not appear to have been at the charge of the State or the prosecutor. It cannot, consequently, be a good reason for a new trial.

HALL, Judge.—Originally, when a prisoner was put upon his trial, he was not entitled to the benefit of witnesses; and when afterwards they were allowed here, they could not be examined upon oath: but, by the statutes of 1 Anne, and 9 Chs. 2d, they are placed upon the same footing with those adduced against him by the Crown. 1 Chitty on Crim. Law, 80. 4 Bl. Com. 360. But before the examination of the witnesses commences, the Crown may demand that they shall retire, in order that each may be examined in the absence of the others; and the same order will be made on the request of the Defendant, but as a matter of indulgence, and not of right. 1 Chitty, 618. 2 Bacon—*Evidence*—Letter E. Note B.

However well calculated the rule, which requires the separation of witnesses on their examination, may be to arrive at the truth, it seems to be altogether arbitrary. In England, we have seen that a prisoner cannot claim it as a matter of right, nor is such a right guaranteed to him in this State. And such is the spirit of our Constitution, that it will (491) not extend any privilege to the State that it denies to a prisoner: the rule must work both ways as to them. Therefore neither can claim it as matter of right; and from what has been said, it may be plainly inferred that no such rule is sanctioned by the Common Law.

But the Constitution of the State declares that every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony: and if the prisoner, when the proper time comes, has a right to introduce his witnesses, as the Constitution authorizes him to do, he would not forfeit that right, if, either through inadvertence or design, he or the State omitted to call their witnesses when directed to do so, in order that they might be separated. The Court have a right to propose it, and a refusal by either party to comply would be open to observation, and, no doubt, might make an unfavorable impression on the minds of those whose province it is to weigh the testimony. It is not a consequence of this view of the case, that the prisoner of the State may properly claim to introduce witnesses after the arguments are gone through. The answer to such an attempt would be, that an opportunity had been already afforded of introducing testimony, and if the parties have not availed themselves of it, it is their own fault, and is then too late, unless, indeed, they offer to the Court satisfactory reasons why such testimony was not sooner offered; in which case, no doubt, it would be received.

As to the conduct of the Jury in their retirement, although eating and drinking, at their own expense, was a misdemeanor in them, yet, as it was not procured by that party in favor of whom a verdict was rendered, the verdict on that account ought not to be set aside. Upon a full consideration of the case, I think a new trial ought not to be granted.

HENDERSON, Judge.—I concur in the opinion delivered by Judge Hall, that the rule for a new trial should be discharged; for whatever may be the consequence of (492) an omission or refusal to obey the order of the Court to name or send out the witnesses, I think the Court is not authorized to reject a witness offered at the proper time, because he was not sent out. This would add another objection on the score of incompetency, unknown in our law as far as I can discover. For I have never yet read or heard of a witness being rejected on that account; and it must be admitted that this motion is predicted on the supposed existence of such a rule. Were a prisoner to refuse to name his witnesses in order that they might be sent out, a Judge would hesitate much before he would direct a jury to retire without hearing such witnesses, if offered by the prisoner when called on to make his defence and offer his proofs. The law, and the Constitution which gives him a right to confront his accusers with witnesses and other testimony, would be a dead letter. Nor is it an answer to say, that this mode of reasoning would give a right of having witnesses introduced after the arguments were closed, and even the charge of the Judge delivered. This right, secured by law, must be claimed at the proper time and stage of the trial; and that is, when the prisoner is called on to make his defence and offer his witnesses and proofs. And if it were in the power of Courts to prescribe rules for the introduction of witnesses, they might fritter down this privilege, or rather right, to nothing. The Courts may prescribe rules to carry the law into execution, but not to prevent its execution. They cannot, by their rules, exclude a party from a right, when that right is asserted at the time and in the manner contemplated by the law which gives that right; and the rule must work both ways: if the prisoner has the right, so has the State. I therefore think the Judge could not have refused the witness because he was not sent out, and that on this point there is no ground for a new trial. I have examined the cases cited in Foster 47, Chitty's C. L. 189. Bac. Evidence, E, and Peake's Evidence. They all speak of sending out the witnesses as a common rule, but do not say what is the (493) consequence of its violation, and not a hint as to its being a ground of rejection, or that a new trial shall be the consequence. I admit, if the Judge was bound to reject the witness, that a new trial should be granted, as the only effective corrective of the error.

As to the other ground, that the Jury took refreshments, I think it has been settled right, that it vitiates the verdict only in those cases, where the refreshments are afforded by the party for whom they afterwards rendered their verdict: and it not appearing in this case, by whom the refreshments were furnished, the new trial cannot be granted. Judgment of death must be pronounced against the prisoner.

VASS AND WIFE *et al.* *v.* HICKS.

From Granville.

Previous to the act of 1806, requiring gifts of slaves to be in writing, a mother made a parol gift of a slave to her children, reserving to herself a life estate in the slave. She continued in possession of the slave more than three years after the gift, having in the mean time married, and within three years after her death, the children brought detinue for the slave against the husband. They are entitled to recover; for

Although the reservation of the life estate was inconsistent with the gift; yet, if the possession during life according to the reservation was by the consent of the donees, such possession was not adverse, and the statute of limitations would not bar their claim.

The reservation being void, the donees could, at any time after the gift, in the life time of their mother, have made a demand, and upon refusul to deliver the slave, brought suit and recovered.

This was an action of detinue for negro slaves, which belonged to the Defendant's wife before her intermarriage with the Defendant. The Plaintiffs were her children by a former husband, and claimed the slaves under a parol gift, which they alleged she had made to them previous to the act of 1806, requiring gifts of slaves to be in writing.
(494) The only evidence of the gift was the declarations of the Defendant, that he had persuaded the mother of the Plaintiffs, before their intermarriage, to give the slaves to her children; that she had given them, but reserved to herself a life estate in them. The Defendant had been in possession of the slaves more than three years, but this suit was brought within less than three years after the death of his wife. The Defendant pleaded the general issue and statute of limitations. Upon the trial, the Court charged the Jury, that the reservation of the life estate in the slaves at the time of the gift was void, and the Plaintiffs might have sued for the negroes at any time after the gift: and that, as their cause of action accrued at the same time with their right to the slaves, the statute of limitations began to run from that time, and more than three years having elapsed, the Plaintiffs were bound by the statute. The Jury found a verdict for the Defendant, and a rule for a new trial was obtained, on the ground of misdirection by the Court. The rule was discharged, and the Plaintiffs appealed.

HALL, Judge, delivered the opinion of the Court:

I agree that the reservation of an estate for life in the slaves was inconsistent with the gift, because, in making the gift, there must have been a delivery of the slaves to the donee, and that delivery left no possession in the donor; and to acquire possession afterwards would be against his own delivery. If, however, he afterwards became possessed of the property by consent of the donee to hold it for life according to the reservation, that possession was held by virtue of such consent, and not under the reservation made at the time of the gift. Suppose, however, that the reservation was void, but that the Defendant held under it, believing, as did the Plaintiffs probably, that he had a right to do so; although the Plaintiffs might have brought their action and recovered the property, yet the Defendant's possession was not
(495) adverse: he held by consent and at the will of the owner: and although the mother might live many

years afterwards, the statute of limitations would not begin to run.

The statute began to run from the time a demand of the negroes was made by the Plaintiffs and a refusal to deliver them up by the Defendant. That refusal was evidence of an adverse possession, but no evidence of such possession anterior thereto was adduced. Although, during the life of his wife, the Defendant exercised acts of ownership over the negroes, he did what he had a right to do, as he supposed, under the reservation. If so, it cannot be considered as evidence of an adverse possession, so as to let in the statute of limitations.

Agreeably to the principles here laid down, the Plaintiffs were entitled to recover in the case of Duncan and wife against the administrator of Parish Self. That was the case of a gift of a negro by Defendant's intestate, to his daughter, one of the Plaintiffs, reserving to himself a life estate. It was decided in this Court, at July term, 1810. Whether in that case the reservation was void, was not the question before the Court, although there was an opinion intimated upon it. This case was not argued by counsel. The rule for a new trial must be made absolute.

(496)

ROYAL ALGOOD *v.* PATRICK HUTCHINS.

From Surry.

An administrator advertised and sold a tract of land; the purchaser entered and sowed wheat, and soon afterwards, discovering that he had acquired no title to the land by his purchase, the contract was rescinded, and he quit the possession. The administrator then sold to another man, who placed a tenant on the land. When the wheat was ripe, the first purchaser, who had sowed it, entered and cut the wheat, and the second purchaser hauled it away. Trespass *vi et armis* will lie for this injury; for, by cutting the wheat, the first purchaser became actually possessed of it, and the hauling of the wheat away was a violation of this possession.

This was an action of trespass *vi et armis;* plea, general issue. The Jury found a special verdict. The land on which the trespass was charged to have been committed belonged to the heirs of a man, who had died intestate, whose widow, together with her brother Patterson, administered on his estate. The widow intermarried with Cousong, and he and Patterson advertised the land for sale, and sold it to Pilcher, who put Algood, the Plaintiff, in possession. Algood, being so in possession of the land, cultivated it and sowed wheat. At the close of the year, it was discovered that a title could not be made to Algood, and the contract for the purchase by him was rescinded; and it was agreed between Algood and Cousong, that Algood should enter and take the wheat when ripe. Afterwards, Patterson sold the land to Hutchins, the Defendant. At the time of the sale, Algood set up his claim to the wheat then growing. Patterson denied that he had any right to it, and told him, if he had made any contract with Cousong for the wheat, he must look to Cousong for it, for Hutchins should take the wheat with the land. Algood was then in possession, but, before the wheat became ripe, he gave up the possession of the land to Hutchins, who placed a tenant on the land. At (497) harvest Algood entered on the premises, and cut part of the wheat. Hutchins, on the same day, also cut part of the wheat, each claiming it. Algood gathered, tied up and shocked the wheat which he cut, and Hutchins took it away, and also that which he had cut; and this was the trespass charged in the declaration. The Jury prayed the advice of the Court, and judgment was given for the Plaintiff; which judgment was affirmed by this Court.

HALL, Judge, delivered the opinion of the Court:

It does not appear from the case, that either Plaintiff or Defendant had any right to the land on which the wheat in question was raised. It was claimed first by the Plaintiff, and then by the Defendant, under the administrator, who, in that character, had no right to it. The lands belonged to certain heirs, and whatever right they might have had to the wheat, or whatever remedy they might have against the Plaintiff for cutting it, it is clear the Defendant had neither. The Plaintiff, under the sale to him, supposed he had a right to sow and cut the wheat. He did sow and cut accordingly. By cutting it, he was actually possessed of the wheat so cut, and the Defendant having violated this possession by carrying the wheat away, the Plaintiff is entitled to recover, and judgment must be given for him.

(498)

Den on the Demise of JOHN YOUNG *v.* DAVID TATE.

From Buncombe.

The act of Congress of 3d March, 1797, gives to the United States a priority, 1st. Where the debtor has become insolvent; 2d. Where the estate of a deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased; 3d. Where the debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof; 4th. Where the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law.

The act of July, 1798, makes the amount of debt due to the United States a lien upon the real estate of the collector, from the time suit shall be instituted for recovering the same; and provides that, for want of goods and chattels to satisfy the judgment, the land shall be sold. The lien is qualified and contingent, and subjects the lands to be sold only where the debtor has not personal estate.

Lambert Clayton being the owner of the land in question, judgment was recovered against him by Hightower in 1807; on which executions regularly issued, and the last was levied on the land, and on the 8th October, 1808, the land was sold by the Sheriff, and the lessor of the Plaintiff became the purchaser, and now claimed the land under this purchase.

Clayton was a collector of the revenue of the United States, and entered into bond on the 8th March, 1799, with Tate, the Defendant, and J. Hightower, his sureties; on which bond judgment was recovered against him at the Fall Court in 1806 for $432 25, and execution regularly issued thereon till May term, 1808; from which time there is a notice upon the docket that an execution issued, but no writ is to be found. From that time no execution issued till May, 1810, when, without any revival of the judgment, a *fi. fa.* issued, and was levied upon the land. The Marshal sold the land, and conveyed it to the Defendant in October, 1810.

Upon the trial, the Court instructed the Jury to (499) find for the defendant; and a rule obtained for a new trial being discharged, the Plaintiff appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: Several questions have been raised in this case, but there are two only, on which it is necessary to give an opinion. These are, 1st. Whether the United States are entitled to a priority in the payment of the debt due to them, under the act of Congress of 3d March, 1797; 2d. Whether they have gained a lien on the land of Clayton under the act of Congress of the 11th July, 1798, ch. 88, sec. 15, by commencing a suit against him for their debt.

The first act of Congress establishes a priority for the United States, where the debtor becomes insolvent, where the estate of a deceased debtor in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, and the priority is extended to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as well as to cases in which an act of legal bankruptcy shall be declared. No construction has hitherto been given to this act, which invests the priority it creates, with the character of a lien, so as to bind the debtor's property from the time he contracts the debt. Wherever the right exists in the United States, it must be upon proof that their debtor comes within some one of the descriptions of the act; that he has become insolvent; that the estate of a deceased debtor is insufficient to pay all his debts; that he has made a voluntary assignment of his property, not having sufficient to pay all his debts; or where the estate and effects of an absconding, concealed or absent debtor, shall be attached. That Clayton became indebted to the United States, and that land belonging to him was sold under execution to satisfy their debt, is all the information (500) the record discloses touching his circumstances. There is no averment of his insolvency, nor any other legal foundation for the priority, and it cannot consequently be presumed to exist.

2d. The act of Congress of July, 1798, makes the amount of debts due to the United States a lien upon the real estate of the collector, from the time suit shall be instituted for recovering the same; and it provides, that, for want of goods and chattels to satisfy the judgment, the land shall be sold. It is evident, from the law, that the lien is qualified and contingent, and subjects the lands to be sold only in those cases, where the debtor has not personal estate. If, after suit brought by the United States against the debtor, any person purchases his land from him, or under an execution against him, the purchaser acquires it, subject to a lien, which shall divest him of it in favor of a purchaser under the United States, who can prove that, when he bought the land, the debtor had not personal property sufficient to pay the debt. But if this proof be not made, the lien had not such an existence as authorized the sale of the land under it. On this material point the record is silent in respect to Clayton. The solvency of his sureties can have no influence upon this question.

As it seems clear that the Defendant can claim no title by virtue of the priority of the United States, or of their lien, it is unnecessary to examine the other objections made to the regularity of the execution. A new trial must be awarded.

(501) ALLEN TWITTY *v.* THOMAS M'GUIRE.

From Rutherford.

A. having covenanted to build for B. a house of certain dimensions and form, of good materials, and to execute the work in a workmanlike manner, built a house of the form and dimensions set forth in the covenant, but part of the materials were not good, and part of the work was not done in a workmanlike manner. B. refused to accept the house, and sued A. on his covenant. B. is entitled to recover, not the value of such a house as A. had covenanted to build, but the difference in value between such a house and the house built, and damages for the breach of the covenant; unless the materials and workmanship be so inferior as to be of little or no value.

This was an action of covenant brought on the following agreement, to-wit:

"I, Thomas M'Guire, of Rutherford county, North Carolina, bind myself, my heirs, &c. to Allen Twitty, his heirs, &c. to build a house in Rutherfordton on the lot said Allen Twitty bought of William Tate, on the following plan, viz. As long and as high as the corner posts and sills which are already got will admit of. The house to be built of good materials, the shingles to be of the heart of pine; the house to have four rooms below, and five windows, a partition across the house below; the upper story to be divided into three rooms, and have four windows, and, if any more, said Allen is to pay said Thomas for it. The lower floor is to be of one inch and quarter plank, quartered, tongued and grooved; the upper floor to be tongued and grooved, of quarter plank; the joice to be ceiled with three quarter plank, tongued and grooved. The house to be ceiled below, and have a good chimney below, and a fire-place above, of good brick. The said Thomas is to have all the old materials that are on the lot, and to have liberty of working on said Allen's land for kiln-drying the plank for said house; but not to destroy timber. The whole work to be done in a good, plain, workmanlike manner. The house to be completed by next October Court. The windows to be twelve lights each, and hung with good hinges; also the doors to be hung with good hinges. The stairs to be run where said Allen may want. For the true performance of the above contract, I set my hand and seal this 30th November, 1816.

THOMAS M'GUIRE. (Seal.)

Test. JN. M'INTIRE.

On which agreement was the following endorse-
(502) ment, viz.

"Received of Allen Twitty full payment for the completion of the within articles, 30th Nov. 1816.

THOMAS M'GUIRE."

The Plaintiff, in his declaration, assigned two breaches of covenant: 1st. That the materials of which the house was built were not good; 2d. That the work was not done in a workmanlike manner.

It appeared in evidence, that the house built was of the dimensions and form prescribed in the agreement, and upon the lot therein mentioned; but that part of the materials were not good, and the work was not done in a workmanlike manner. That the value of the house, if built of such materials and in the manner required by the agreement, was twelve hundred dollars; and the value of the house, as built, was eight hundred dollars; that the Plaintiff had refused to accept the house in consequence of the insufficiency of the materials and the work. The Court charged the Jury, that if they believed the evidence, the Plaintiff was entitled to recover the value of such a house as Defendant had agreed to build, with interest on that sum from the day on which the house was to have been completed; and that Plaintiff having refused to accept the house, the Defendant had the right to it, and might remove it. The Defendant's counsel contended that the Plaintiff was entitled to recover only the difference between the value of the house built, and the value of such a house as he had agreed to build; and that, it being erected on the Plaintiff's lot, Defendant had no right to remove it, notwithstanding the Plaintiff's refusal to accept it. The Jury gave a verdict for 1,340 dollars, the same being the value of such a house as Defendant had agreed to build, and interest on that value from the day on which the house was to have been completed. A new trial was moved for, and, it being refused, the Defendant appealed.

HALL, Judge, delivered the opinion of the Court:
(503) It appears that the house built was of the dimensions and form set forth in the agreement of the Defendant. When a carpenter builds a house substantially different in dimensions and form from that contracted to be built, it is in no wise a compliance even in part with his contract; because in such case it may not answer the purpose for which

his employer contracted to have it built. Besides, it is the folly of the carpenter to build such a house, when it may be reasonably presumed his knowledge in his art would enable him as readily to build a house of one form as another. But where the house built, as in the present case, is precisely such a one as the Defendant contracted to build, as to the size and form of it, I think the case is different. Because the house in question will answer the purpose intended by the Plaintiff, although it is of less value on account of some of the materials of which it is built not being so good as those contracted for, nor the house built altogether in a workmanlike manner. If this were not the case, the smallest deviation by a carpenter, in finishing a house, from the mode agreed upon, would render him a delinquent *in toto*, when, perhaps, the thing complained of did not amount in value to forty shillings. It is therefore better that the house built under such circumstances should be considered a part performance of the covenant on the side of the Defendant, than that it should be thrown altogether on his hands; particularly as an action lies for the Plaintiff to recover adequate damages for the injury sustained by him. I do not pretend to say, that the house built, although of the dimensions and form stipulated by the Defendant, is a part performance of the covenant, if the materials and the workmanship are so vastly inferior as to be of little or no value. In such case, full damages should be recovered for a non-performance of the contract. These are circumstances open for observation by the Court and Jury on the trial.

In the present case, the Jury have found that the (504) house contracted to be built was of the value of 1200 dollars, and of the house built 800 dollars. The measure of damages is the difference between those sums, and damages for the breach of the contract. The rule for a new trial must be made absolute.

THOMAS WILLSON *v.* JACOB SHUFFORD.

From Lincoln.

A processioner reported to the County Court that he had been called upon by A. to procession his land; that B. had attended; that he began at a corner, and run one line, when B. forbade the processioning. Upon this report, the Court appointed five freeholders to go with the processioner, and procession the land. They returned to the Court a report of their proceedings, and a motion being made to set their report aside and quash the order of the County Court appointing them, the motion is allowed; because the processioner did not in his report to the County Court set forth the lines in dispute, nor the circumstances on which the dispute was founded, so as to enable the Court to decide which party prevailed, whether the lines have been established correctly, and who shall pay costs.

It is only by comparing the report of the processioner with that of the freeholders, that the Court can determine which party prevailed in his claim.

Maxwell Willson, one of the processioners for Lincoln county, reported to the County Court, in July, 1814, "that he had been called upon by Jacob Shufford to procession a tract of land; that Thomas Willson attended, and he began at a post oak, and run south fifty-seven and a half west ninety-two poles to pointers, where said Willson forbade the processioning." Upon this report being made, the Court appointed five freeholders to go with the processioner, and procession the land; and the processioner and freeholders made a return of their proceedings to October term, 1814; and therein set forth that they met on the premises on the 20th (505) September, and, after surveying the lines in dispute, and hearing the evidence on both sides, they had decided, and had processioned Shufford's land according to the following courses, viz. Beginning," &c.

It was moved on behalf of Willson, that *this report* should be set aside, which motion was disallowed, and he appealed to the Superior Court; and the motion coming on to be considered in that Court, it was ordered and adjudged that the said report be set aside, on the ground that it did not set forth the lines in dispute between the parties, nor the circumstances on which the said dispute was founded, so as to enable the Court to decide whether the processioner and freeholders have established the lines correctly. From this judgment Shufford appealed to this Court, where the report was set aside, upon the ground that the processioner had not made such a report to the County Court, as justified that Court in appointing five freeholders to procession the land.

HENDERSON, Judge, delivered the opinion of the Court:

By the act of 1779, ch. 11, it is directed, that where a line is disputed, and the processioner is forbidden by either party to proceed further in running and marking the same, the processioner shall report the same to the County Court, truly stating all the circumstances; whereupon the Court shall make an order that five freeholders shall procession the land, &c.; and that the costs shall be paid by the party against whom the decision shall be made. In this case the processioner states, that after having began at a post oak and run a certain course and distance to pointers, he was stopped by Willson; upon which the Court made the order in question.

We think that the order for appointing the five freeholders to procession the land should be quashed, on the ground that the report of the processioner is insufficient to warrant such an order. By comparing his report with any return the five freeholders might make, it would not appear (506) which party prevailed; for when the processioner stopped, he was perfectly stationary. It does not appear where he was going from the pointers, nor does it appear to what part of his proceedings Willson objected; whether it was as to the beginning, the line he had run, or the line he was about to run. Indeed, it rather appears that there was no objection to what he had done, (for he was not stopped in doing it,) but rather to what he was about to do. What that was he does not state. Had he been stopped in running any line, or forbidden to proceed on one he was about to run, which he pointed out in his report, it would then be within the act. Therefore, as what was the disputed line does not appear in his report, which we consider as the declaration, or rather the pleadings, of the parties, setting forth their respective claims, there was nothing to justify the order of processioning, and the order must be quashed; and more especially as it is by comparing the report of the processioner with the report of the freeholders, that the Court can say which party prevailed in his claim; for it is from that the costs are to be adjudged. It is true the freeholders report that Shufford prevailed; but how do they know that, but from the verbal information of the processioner, or some other person. Besides, it is their business to report their proceedings, and for the Court to judge who prevailed, by comparing their report with their records. But their report is rather to be understood that Shufford prevailed in the claim *he set* up before. What he set up before the processioner, they, as a body, did not know, nor had they any means of knowing. The order must therefore be quashed, and Shufford must pay the costs.

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(507) Den on the Demise of BENJ. SMITH *v.* HANSON KELLY.

From Brunswick.

This Court will award a writ of *certiorari.* An appeal bond, with a statement of the case made out by the presiding Judge, was filed in this Court, but there was no transcript of the record certified by the Clerk under the seal of the Court in which the appeal had been granted. A diminution of the record being suggested, a *certiorari* was awarded, such a writ being necessary for the exercise of the powers given to this Court.

The Sheriff returned on a *fieri facias*, that the Bank of Newbern purchased the lands in question. A. upon the trial of an ejectment for these lands, gave in evidence a resolution of the President and Directors of the Bank, requesting the Sheriff to make the deed to him, and then gave in evidence the deed. Held that this deed is good to pass the title as against the Defendant in the execution, notwithstanding the Sheriff's return; for the purchaser's title is not dependent upon any special return the Sheriff may make on the execution. The law permits one person to bid off property at a Sheriff's sale, and then relinquish his bid to another.

In this case an appeal bond, with the statement of the case made out by the presiding Judge, was filed in this Court, but there was no transcript of the record sent up certified by the Clerk under the seal of the Court. A diminution of the record was suggested, and a motion made that a writ of *certiorari* be issued to the Clerk of Brunswick Superior Court of Law. This motion, after much consideration, was allowed; for that the writ moved for was necessary in this instance for the exercise of the powers given to this Court. The Court cannot proceed but upon the whole record, and they had here conclusive proof of an appeal having been prayed for and granted, from there being an appeal bond. The *certiorari* issued, and the record was certified.

The case was, that Benjamin Smith, the lessor of the Plaintiff, being seised of the lands in question, judgment was recovered against him by the Bank of Newbern, execution issued, and was levied on the lands, and the Sheriff's (508) return on the execution set forth that the Bank of Newbern had, at the sale of the lands under the execution, become the purchaser. The Sheriff executed a deed to the Defendant, who, upon the trial, gave this deed in evidence, and with it a resolution of the President and Directors of the Bank of Newbern, directing the Sheriff to make the deed to him. The Court charged the Jury that the Plaintiff was entitled to recover; for, although it appeared that the lands had been seised and sold by the Sheriff, yet it did not appear that the legal title to the lands had been divested, out of Smith, inasmuch as the Sheriff, by virtue of his office, could convey that title only to such person or persons as the record shewed had purchased the lands. Here he had returned on his execution that the Bank of Newbern had purchased the lands, and the deed had not been made pursuant to this return; that if the Sheriff executed a deed to the Defendant in consequence of the resolution of the President and Directors of the Bank, he did it not as Sheriff, but as agent, and, before the deed could be operative, it must shew there was title in the principal, and that proper authority had been given to the agent to make the deed. The Jury found for the Plaintiff. A rule for a new trial was obtained, and, it being discharged by the Court, the Defendant appealed.

Gaston, for the lessor of the Plaintiff.—The return of the Sheriff to the execution is evidence to whom he sold under the execution. 11 East. 296. 4 Bur. 2129. In this case no other execution is shewn than that under which the Bank of Newbern purchased. The deed to the Defendant is unsupported by any execution. This deed cannot derive support from the execution produced, through the medium of the resolution of the Bank of Newbern. The deed does not state the same transaction; and instead of being explained by it, is contradicted by the execution and resolution. If these give any authority, the act done should be con- (509) sistent therewith. Naked authorities are ever to be executed exactly: "Powers shall not be exceeded, nor their conditions evaded, but shall be strictly pursued in form and in substance; and all acts done under a special uthority not agreeable to it, nor warranted by it, are void." Com. Dig. *Poiar.* C. 1 Bur. 60, 120.

It was not competent for the Bank of Newbern to extend the power of the Sheriff. His whole authority is given by law, and he can, as Sheriff, do nothing beyond that authority. The right to make a deed for lands sold, is but a necessary incident to the power to sell, and can go no further than the principal power.

Not only the substance, but the mode of executing a public authority is essential: as if a Sheriff behead a man ordered to be hanged. This general doctrine seems to need no authorities; but it is supported by Jones *v.* Gibson, decided in this Court, N. C. Term Rep., 42, and by cases decided in the Court of Appeals in Virginia. 1 Mumf., 428; 2 Hen. and Mumf., 341. That the deed must be made to the purchaser, is also shewn by the act of 1799, ch. 28. A little reflection will point out the alarming mischiefs that would arise from any latitude allowed to the Sheriff in such cases.

TAYLOR, Chief Justice, delivered the opinion of the Court: The Defendant, in producing a judgment against Smith, an execution, a levy upon property liable thereto, and a deed from the sheriff, has established a title in himself; because he has thereby shewn a lawful authority in the Sheriff to sell, and the due exercise thereof.

If a judgment be erroneous, and be afterwards set aside or reversed, the title of an intermediate *bona fide* purchaser at a Sheriff's sale cannot be affected: nor in an ejectment against a purchaser at a Sheriff's sale, can the regularity of an execution be questioned. It would be inconsistent then to make the purchaser's title dependent upon any (510) special return the Sheriff makes on the execution; more especially when such return is contradicted by his deed. A return is nothing but the Sheriff's answer relative to that which he is commanded to do by the writ; and is intended to inform the Court of the truth of that alone which it concerns them to know. Third persons ought not to be injured by a return, because the Sheriff has departed from its proper object, and mingled with it irrelevant matter.

It is not necessary to express any opinion as to the effect of a return in point of evidence of any fact stated in it; for however conclusive it may be in that view, it cannot be more so than a fact stated and agreed to by the parties in the case. So that although the return states the Bank to have become the purchaser, yet a fact agreed is, that the Sheriff's deed to the Defendant was made with the consent of the Bank. Taking the facts from the case and the return, the truth is, that the Bank bid off the property, and relinquished the bid to the Defendant, in which there is nothing unlawful. There must be a new trial.

(511)

PETERSON BROWNE *v.* ROBERT BLICK, administrator of PRISCILLA HILLIARD, deceased.

From Northampton.

An action of waste being brought against tenant for life by devise, the tenant pleaded the general issue, and, pending the suit, died. The suit abates. It cannot be revived against the representatives of the tenant, either under the provisions of the act of 1799, ch. 18, or of the act of 1805, ch. 8.

The action of waste is not within the words of either of those acts; and it will not be considered within their Equity; because,

1. The action is given by the statue of Gloucester, and that is a highly penal statute. The place wasted is forfeited, and treble damages are given. The action must therefore be considered as in some degree vindictive, especially as against the representatives of the wrongdoer.
2. Those acts aim in all cases to apportion the redress to the wrong done as nearly as possible.
3. Those acts are reciprocal in their operation. They confer on the representatives of *either* party, dying, the *like* right to prosecute or defend suits; and contemplate only those cases wherein the right may be equally and reciprocally exercised. There is nothing in the theory or principles of the actions enumerated in those acts which forbid their being revived for the Plaintiff, or against the Defendant; but the writ of waste is founded upon principles peculiar to itself, and more especially dependent upon a privity between the reversioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the reversioner and the tenant who commits waste there is no privity, the waste being committed in the life-time of the reversioner.

This was an action of waste brought against Priscilla Hilliard; and by the writ she was summoned "to answer unto Peterson Browne in a plea, why, in the houses, lands and woods, in the county of Northampton, which she holds and is legally entitled to for the term of her life, by the devise of John Hilliard, her late husband, deceased, she has made waste, spoil and destruction, to the disinheriting of him the said Peterson Browne, against the provisions of law, and to the damage of him the said Peterson one thousand Pounds."

The Defendant pleaded "the general issue and (512) statute of limitations." Pending the suit, Priscilla Hilliard, the Defendant, died; her death was suggested on the record, and a *scire facias* was issued to Robert Blick, her administrator, to make him a party and revive the suit. He appeared, and pleaded in abatement, "that the action could not be revived against the administrator of Priscilla Hilliard, his intestate." The Plaintiff replied, "that Priscilla Hilliard, against whom the action was brought, had a life estate in the lands on which the waste alleged was committed, which expired by her death." To this replication the Defendant demurred, and the Plaintiff joined in Demurrer. The Court sustained the plea in abatement, and the Plaintiff appealed.

Mordecai, in support of the demurrer.—It is clear, that by the Common Law, the wrong for which this action is brought dies with the person, and the action died with it. Co. Lit. 43, b. 2 Saund. 252, in Note. Is the abatement prevented by the act of 1799, ch. 18; or of 1805, ch. 8? It is not. The first section of the act of 1799 declares, that "no action of ejectment shall abate by the death of any Defendant or Defendants in said action; but the same may be revived by serving on the heirs at law or devisees of said Defendant, or their guardian or guardians, within two terms after his decease, a copy of the declaration," &c. The second section provides for the appointment of guardians for such heirs or devisees as are minors. The third section directs notice to be given by advertisement, where such heirs or devisees reside out of the State. The fourth section provides for "the continuance *of any suit*, where Plaintiff or Defendant shall die, and there shall be a contest for the administration or for the probate of the will, till such contest shall be determined, and until the expiration of one term thereafter." And the fifth section declares, that no action of detinue or trover, or action of trespass, where property, either (513) real or personal, is in contest, and such action of trespass is not merely vindictive, shall, in any cause or Court, abate or be discontinued by the death of either party, Plaintiff or Defendant; but the same may and shall be revived in the manner prescribed for the revival of other cases."

The act of 1805, declares that "no action of trespass *vi et armis*, or trespass on the case, instituted, or which shall hereafter be instituted, in any of the Courts of this State, to recover damages done to property either real or personal, shall abate by the death of either Plaintiff or Defendant; but the same may be revived in behalf of or against the representatives of the deceased Plaintiff or Defendant, under the rules and regulations prescribed for the revival and continuance of other actions." The Legislature have expressly named the actions which may be survived: The action of waste is not one of them. Those named are, ejectment, detinue, trover, trespass *vi et armis*, trespass on the case. The reason wherefore Courts of Equity are not bound by the statute of limitations, is because certain actions or remedies are named, and the time of limitation affixed; but bills in Equity are not named. And it was because the action of debt *for arrearages of rent* was expressly mentioned, that it was held the statute applied to that, but not to an action of debt on a contract without specialty. 1 Law Repos. 516. So here the abatement being prevented when *a certain form* of action is adopted, the act applies only to those forms of action.

And if the Court would not extend by Equity, the limitation to another form of action, applicable to the subject matter, but would permit a Plaintiff to recover in *debt*, the very thing which he would have been barred from recovering in *case*, can they now say, that by the Equity of this statute, he shall recover a *different thing* from what could be recovered in trespass or case, that is, treble damages?

The action of waste differs in all its features from (514) an action of trespass or case, It is a mixed action, real for the place wasted, and personal for damages. A release of all actions real, will not discharge it. Co. Lit. 355, b. It will not lie by the heir against assignee of tenant by the courtesy, because being founded on privity of estate, as long as that privity lasts, it must be brought against the tenant himself. Ibid. 54, a. Case would lie by the heir against the assignee. 13 Johns. 260.

Waste only lies for him who hath an immediate estate of inheritance (Co. Lit. 53, b): Case lies for a remainder man for years.

If after waste committed, the reversioner aliens, his action is gone, although he takes the estate immediately back; for the action depends upon privity, and the reversion must remain as it was when the waste was committed. Ibid. But case would lie.

Waste doth not lie against guardian in socage; but trespass or account lies. Ibid. 54, a.

Trespass lies *for* him *in possession:* Waste, for him who has *no right* of possession. Trespass lies *against* him who hath *no* right of possession: Waste only against him who *hath* a right of possession and property.

Waste lies *only* for him who hath *an inheritance* in reversion: Trespass for him who hath a *mere possession.* In trespass the Plaintiff recovers for the injury: In waste, for triple the damage sustained. All these are express distinctions between these actions.

Nor is this within the Equity of the acts of 1799 and 1805. Penal statutes are not to be construed to the prejudice of those on whom the penalty is inflicted. Plowd. 17, 18, 47, 86, 125. And if the statute of limitations, which is styled a statute of quiet and repose, shall not be extended, but confined to the forms of action specially enumerated, much less shall the statutes for preventing abatement, be extended to save an action not within their terms, and an action so highly penal as this.

Seawell for the Plaintiff, against the demurrer.—
(515) It is admitted that the present action abates at Common Law; but it is contended that it survives under the acts of 1799 and 1805. By these acts, it is clear that the Legislature had in view a considerable inroad upon the principles of the Common Law. They seemed disposed to bring the surviving of actions to that standard which is supported by reason and interest; namely, that actions brought for *actual* injury done to men's property, should follow the property into whosesoever hands the title passed on the death of the owner, when he was Plaintiff, and that in case of the Defendant's death, *he* should be accountable, who in law acquired the benefit of such injury done. But that in actions merely vindictive, brought to redress an injury done the *feelings*, (and on that account may properly be called revengeful) they have wisely left us at Common Law; for by the death of either party, it became impossible to obtain the object for which the action was brought.

That this was the design of the Legislature, is clear from a view of both acts. The first prevents the action of ejectment from abating, and then provides for detinue, trover and trespass, where property either real or personal is in contest, and such action is not *merely* vindictive. The second act recites, that whereas *doubts* had arisen whether the act of 1799 extended to cases for the recovery for injuries done to real estate, and whether suits for such injuries could be revived for or against the representatives of the deceased party; to remove these "doubts," and make actions brought to recover for injuries done to real and personal property survive, although the title did not come in question, the act of 1805 was passed. This being a *remedial* statute, and the design of the framers expressed in the preamble, (which has been often called the key to unlock the maker's meaning,) the statute should be extended to every case which comes within the mischief provided against. Co. Lit., 246; 1 Plow. 53, 178, 205, 231; Hard., 210; 2 Plow., 465.

(516) The like construction has been put upon the 4th Ed. 3d. *de bonis asportatis*, which gives *executors* the right to maintain *trespass*. Yet it has been held to extend to administrators; because within the mischief; Cro. Eliz., 384, and in like manner to extend to *trover*, though trespass only is named in the statute, *Ibid*, 377; and for the same reason to a *quare impedit*, and *ejectione firmæ*. *Ibid.* 207. And in Ventris, 30, cited in Bac. Ab. title Executors and Administrators, letter N. executors were allowed to maintain debt and recover a *penalty*, for not setting out titles according to the stat. of Ed. 6th, to their testator in his life time; and it was said to be so ruled upon the Equity of the statute of Ed. 3d, *de bonis asportatis*.

These authorities irresistibly prove, that where the Legislature have designed to permit the cause of action to survive to executors, it shall be extended to every case *in principle* with the one specially named; and that as the statute of Ed. 3d was to enable the *personal* representative to recover for damages done to the personal estate, although executors only were named, yet the statute should be construed to extend to administrators; and although trespass only was named, it should extend to trover; and though the manner of doing the damage was specified, "by carrying away goods," yet it should extend to not setting out tythes, to a case where treble damages are given by the statute, and likewise to an *ejectione firmæ*.

These authorities prove that where a statute is remedial, and a case is within the mischief intended to be remedial, one thing will be taken for another, one person for another, one action for another. Even where the remedy is in some degree penal, the recovery being for an actual injury, it will make no difference. That the present action is for an actual injury is proven both by its name and its nature; for if a Jury should find nominal damages, the Plaintiff could not have judgment.

(517) It seems to have been the policy of the English Law to let personal actions die with the Defendant. Our Legislature have placed both Plaintiff and De-

fendant upon the same footing, and, consequently, whatever would bring a Plaintiff within the Equity, would make the Defendant liable within the Equity: for the entire Equity of our acts is giving the Plaintiff a right to recover, and making the Defendant liable to answer. The Defendant where he is so made liable, is exposed to no hardship; for he is accountable only to the extent of a fund, which he holds as a volunteer.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

My first impression upon the argument of this case was in favor of the Plaintiff; but upon a careful examination of all the cases cited, and after a full discussion of the subject amongst my brothers, I concur with them in opinion that judgment ought to be rendered for the Defendant.

The case is shortly this: The Plaintiff sued out a writ of waste against Priscilla Hilliard, who was in possession of the land as tenant for life, under a devise from her husband. Pending the suit she died, and a *scire facias* issued against her administrator to revive the suit. To this he has pleaded that the action cannot be revived against him; the Plaintiff replies that the intestate was tenant for life, and the Defendant demurs. The question to be decided is, Whether the writ of waste is comprehended in the words or spirit of the acts, which provide for the revival of suits for or against the representatives.

The act of 1899, provides against the abatement of actions of ejectment, detinue, trover, trespass where property real or personal is in contest, and such action of trespass is not merely vindictive.

The act of 1805 preserves in like manner, the actions of trespass *vi et armis*, and trespass on the case, instituted to recover damages done to property either real or personal.

(518) The writ of waste is not within the words of either of these acts; but as it is an action in which real property is in contest, and is not merely vindictive, may it not be within the Equity of the act of 1799, although it be not an action of trespass? And as it is instituted to recover damages done to real property, may it not in like manner be within the Equity of the act of 1805? The solution of these questions may be facilitated by considering the nature of the action. Whether it lay at Common Law against a tenant for life, such as the Defendant's Intestate was, is not

clearly ascertained. Lord Coke asserts that it did not, upon the principle that the party creating the estate might have provided against the commission of waste; and that it lay against those tenants only whose estates were created by the Law, as tenant in dower and by the courtesy. 2 Inst. 299. The authority of Bracton is the other way. 2 Reeve 149. But whichever opinion may be correct, it is certain that a new remedy is given by the statute of *Gloucester*, and that the action now brought rests its foundation on that statute. The words of it are, "He that shall be attainted of waste shall lose the thing that he hath wasted, and moreover, shall recompense thrice so much as the waste shall be taxed." The word "attaint," which is used in the law to denote the conviction of a crime, the forfeiture of the place wasted, and the treble damages, bespeak this to be a highly penal statute; and when the remedy under it is contrasted with that at Common Law, (which was damages merely, and the appointment of a superintendent) it may be almost pronounced vindictive. But when it is considered further, that real property ceases to be in contest by the death of the tenant, and that three times the amount of the injury sustained, are sought to be recovered out of the assets of him who did the wrong, who is no longer alive to defend himself, to warn by example, or be reformed by punishment, it may be thought with greater confidence, that the action has become vindictive. The Common Law, upon which all the actions (519) specified in the two acts of 1799 and 1805 are founded, aims in all cases to apportion the redress to the wrong really done; and it does not seem to be a sound construction, to extend by Equity those acts to a case so wholly adverse to its spirit. This rule is not less just than those which require penal acts to be construed strictly and forbid the creation of a penalty by implication.

But the question may be considered in another and perhaps a more satisfactory light. The evident design of the two acts of 1799 and 1805, was to prevent the death of either party operating an abatement of the suit in the cases enumerated, and thus partially to repeal the Common Law maxim of *actio personalis moritur cum persona.* They intended to confer upon the representatives of *either* party, dying, the like right to prosecute or defend the suits, and hence they contemplated only those cases, wherein the right might be equally and reciprocally exercised. There is nothing in the theory and principles of the action of trespass which forbid the representatives of the Plaintiff from prosecuting it, or those of the Defendant from defending it. This was alone prevented by force of the maxim just quoted. But the writ of waste is founded upon principles peculiar to itself, and more especially dependent upon a privity between the reversioner and tenant. This ligament once broken, the action is gone. No one shall have an action of waste unless he hath the immediate estate of inheritance. Co. Lit. 53, b. Between the heir of the reversioner and the tenant, there was no privity during the life of the reversioner, when the waste was committed. If the reversioner bring the action and die, could the acts mean that his representatives should prosecute the suit, and thus destroy the principle on which it is founded? Assuredly not. Then the action of waste was not contemplated by the Legislature, and is not embraced by the acts, which allow a revival "in behalf of or against the representatives of *either party*."

To revive the action *against* the representatives of (520) the Defendant, would in many cases lead to equal innovation and more evident injustice. The same privity requires that the reversioner shall bring the action of waste against the tenant for life, although the waste committed be done by a stranger. The law is the same where the tenant is an infant. Co. Lit. 54, a. Yet if the acts are to be extended to this action, it must be revived against the executors and administrators of innocent persons, who never were "attainted" of waste, and against whom it was only suable as the consequence of an artificial system. In many cases the privity is destroyed by the act of the parties in their life time, and, in consequence, the action abates. It would be strangely incongruous to revive it, notwithstanding the destruction of the privity by death.

It has been ably and strenuously argued for the appellant, that the statute of 4 Ed. 3, ch. 7, has received an equitable construction, by which other actions, though not within the words, have been held to be within the meaning and intent; and that the decisions thereon will justify the Court in construing the acts of 1799 and 1805 to include the action of waste. That statute, after reciting that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, so as such trespasses have remained unpunished, enacts "That the executor in such cases shall have an action against the trespassers, and recover their damage in like manner as they whose executors they be, should have had if they were living." The words of this statute are general, not specifying the kind of action which the executors shall have, but *actions* against the trespassers. The word *trespassers*, which is used in the sense of wrong-doers, had a more extensive meaning in that age than it now bears. Cases which approached nearer to the nature of a contract, were comprehended under the term *trespasses.* 3 Reeve's His. E. L. 89. In this view the statute would (521) have borne a larger construction than it has received. Chitty on Plead. 58.

Rules for construing statutes have been cited from Plowden and other books which contain much sound legal reasoning; but the extent of their application in fixing the meaning of modern statutes, is materially limited by the decisions of later times. In Bradly *v.* Clarke (5 Term Rep. 201), Lord Kenyon says, "Many cases have been cited to shew that the Courts extended the construction of ancient acts of Parliament beyond the words, and in some instances (I should have thought) beyond the fair import of them. However, as such constructions have been made, they become the guide for succeeding Judges." In the same case, the language of Buller, Justice, is more explicit: "With regard to the construction of statutes according to the intention of the Legislature, we must remember that there is an essential difference between the expounding of modern and ancient acts of Parliament. In early times, the Legislature used (and I believe it was a wise course to take) to pass laws in general and in few terms: they were left to the Courts of Law to be construed, so as to reach all the cases within the mischiefs to be remedied. But, in modern times, great care has been taken to mention the particular cases within the contemplation of the Legislature; and, therefore, the Courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes."

The same principles governed the decision in the case of Willson *v.* Knutly, in which an action of covenant was brought upon the statute of 3 W. and M. ch. 14, against the devisee of land, to recover damages for a breach of covenant by the devisor. That statute recites, that "it is not reasonable or just that, by the practice or contrivance of any debtors, their

creditors should be defrauded of their just debts; nevertheless, it hath often happened that several persons, hav-
(522) ing, by bonds and other specialties, bound themselves, and their heirs, and have afterwards died seised, &c. have to the defrauding such their creditors devised the same," &c. The enacting clause then provides that in the cases before mentioned, such creditors shall have their *actions of debt* upon the said bonds and specialties. Here it was agreed that an action of covenant was within the mischief recited, and that it would have been better to have made the remedy coextensive therewith. But the Court say, that in construing a comparatively recent act of Parliament, where a particular remedy is given by action of debt on bonds and specialties, where no remedy was before, they cannot extend it to actions of *covenant;* that to do so, where the words giving the form of action are precise, would be to legislate, and not to construe the act of the Legislature. The case, too, is rendered stronger, in as much as the act was levelled at a species of fraud, towards the suppression of which it was desirable that it should receive every possible extension. 7 East. 128.

The words of the preamble of the act of 1805, profess its design to be to remove the doubts which arose out of the act of 1799, whether actions for the recovery of damages for an injury to real or personal property could be revived, where the property itself was not in dispute. If the enacting clause had been as general as the preamble, to wit: "That actions for injury to real or personal property may be revived, although the property itself is not in contest," they would certainly have included the action of waste after the death of a Defendant who was tenant for life. But where the words of an enacting clause are clear and unambiguous, it is neither necessary nor allowable to call in the aid of the preamble to enlarge their meaning. The demurrer must be sustained.

(523) CRISWELL KEY *v.* SAMUEL ALLEN.

From Rockingham.

In detinue. The Jury find for the Plaintiff, and assess damages for the detention of the slaves, but do not find the value of the slaves. The Court will award a writ of enquiry to assess the value, and not order a new trial *in toto.*

What matter cannot be supplied by writ of enquiry.

If the principal Jury omit to find matter which goes to the very point of the issue, and upon which, if they had found a false verdict, an attaint would lie by the party injured, such matter cannot be supplied by writ of enquiry, because the party thereby injured may lose his writ of attaint, which will not lie upon an inquest of office.

The rule is, that where the Court *ex officio* ought to enquire of any thing upon which no attaint lies, there the omission of it may be supplied by a writ of enquiry of damages; but in all cases where any point is omitted, whereof attaint lies, it shall not be supplied by writ of enquiry, because on that writ no attaint lies.

This rule of the Common Law, as to writs of enquiry, is not enforced here as it is in England. The doctrine of attaint has never been in force here; and therefore the Courts will award writs of enquiry in all cases where convenience and the justice of the case require it.

Formerly inquests of office were held by the Sheriff. By the act of 1777, ch. 2, cognizance is taken of them by the Court that awards them: and even if the law of attaint were in force, it would be matter of speculation whether it would not apply to writs of enquiry executed by Courts of record.

This was an action of detinue for sundry negro slaves. The Jury found for the Plaintiff, and assessed damages for the detention of the slaves, but did not find their value. The Defendant moved for a new trial, and a question arose whether the Court should award a new trial *in toto*, or permit the verdict to stand, and award a writ of enquiry to assess the value of the slaves.

HALL, Judge, delivered the opinion of the Court:

It is laid down in the English books, that if the principal Jury omit to find matter which goes to the very point of the issue, and upon which, if they had found a false (524) verdict, an attaint would lie by the party injured, such matter cannot be supplied by writ of enquiry; because thereby the party may lose his action of attaint, which will not lie upon an inquest of office. Carth. 362. L. Ray. 59. 1 Salk. 205. Skinner 595. Pl. 8. And in Cheney's case, (10 Coke, 118,) where a writ was brought *de valore maritagii*, and issue was taken on the tenure, &c. and it was found for the Plaintiff, and the Jury assessed damages and costs, but did not enquire of the value of the marriage, as they ought to have done, it was resolved that the verdict was insufficient; and it was said that three things are to be recovered, to-wit, the value of the marriage, damages and costs; and that although the issue be *de valore maritagii* upon the tenure, yet as a consequent or dependent upon the issue, the Jury, if they find for the Plaintiff, are, as parcel of their charge, to enquire of the value of the marriage, &c. and if they assess excessive damages, attaint lies. In this case, it is to be observed, that if the Plaintiff could not recover any thing in kind, as in detinue, where he may recover the thing sued for, but could only recover the value of the marriage, damage and costs. If the marriage were not assessed, he could recover nothing in lieu of it.

In detinue, the Plaintiff recovers the value of the thing sued for, if the thing itself be not restored upon the issuing of a distringas. In the first case, the object of the suit cannot be attained without assessing the value of the marriage; in the latter, it may or may not. Lord Coke, however, seems to have made no difference in the two cases: he says "the rule is that where the Court, *ex officio*, ought to enquire of any thing upon which no attaint lies, there the omission of it may be supplied by a writ of enquiry of damages; but in all cases where any point is omitted whereof attaint lies, it shall not be supplied by writ of enquiry, because on that writ no attaint lies; and therefore in detinue, if the Jury find damages and costs, and no value as they ought, (525) it shall not be supplied by writ of enquiry of damages, for the reason aforesaid." However, afterwards in Burton *v.* Robinson, (1 Keble 882) where Cheney's case was cited, in an action of detinue for a deed, a writ of enquiry seems to have been granted to assess the value, which the first Jury omitted to do. But this decision met with the disapprobation of Lord Holt, as expressed by him in Sir James Harbert's case, (Skinner 595. Pl. 8) for the reasons given in Cheney's case. But the reasons which influenced the Judges in England in awarding or not awarding writs of enquiry to supply the omissions of the principal or first Juries, do not apply in this State, because the doctrine of attaints never has been nor is it now in force here. It has fallen into disuse in England, but the course of Judicial proceedings to which it gave rise still continues.

In replevin brought and a nonsuit entered, or in case of a demurrer to evidence, and the Jury discharged, there shall be a writ of enquiry, for the Jury does not give any verdict, and they cannot assess the damages. Skinner 509. Pl. 8. The like Law holds in case of common demurrers. 1 Plowd. 283.

As we are, therefore, not restrained by the law of attaints from issuing writs of enquiry, where convenience and the justice of the case require it, I think it agreeable to both, that one should issue in the present case. Formerly inquests of office were held by the Sheriff; but by the act of 1777, ch. 2, sec. 80, cognizance is taken of them by the Court that awards them. And, indeed, if the law of attaints were in force, it would be matter of speculation whether it would not apply to writs of enquiry when executed by Courts of Record. The Court are of opinion that a distringas should issue, and if the slaves be not delivered to the Plaintiff, that a writ of enquiry should be issued, to ascertain the value of the slaves, and for the value thus ascertained, the Plaintiff may sue out a *fieri facias*, or *capias ad satisfaciendum*, at his pleasure.

(526)

SAMUEL DICKENS, Admin'tor of the Estate of WILLIAM COCKE, Deceased, v. WILLIAM SHEPPERD.

From Person.

Assessment of damages in case of eviction.

A. sells to B. three six hundred and forty acre tracts of land, and conveys with special warranty, and covenants that if B. shall lose the land by reason of a better title being in some other person, he will restore the purchase money with interest, and in proportion should he lose any part thereof. Each tract, although containing the same number of acres, is of different value. B. is evicted from one of the tracts by a better title. The rule to be observed in assessing damages in this case is, that

1. The whole of the three tracts are to be valued in gross at the price paid for them by the vendee;
2. The relative value of the tract lost to the value of the whole, is then to be ascertained; and the amount of this relative value with interest thereon, is the amount of compensation to which the vendee is entitled for his loss.

This was an action of covenant, and the question was, upon what principle damages should be assessed. The case was, that William Shepperd, on the first day of February, 1802, executed to William Cocke an obligation in the following words, to-wit:

"Know all men by these presents, that I William Shepperd, of Orange County, North Carolina, am held and firmly bound unto William Cocke in the just and full sum of *l*1333 6 8: To which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

"The conditions of the above obligation are such, that whereas the above bound William Shepperd hath this day given a special warranty deed for three six hundred and forty acre tracts of land, situate, lying and being in the State of Tennessee, in Sumner county, on the waters of Hickman's creek, for which the said William Cocke hath this day paid him the sum of six hundred and sixty-six pounds, thirteen shillings and four pence: Now if it shall hereafter appear that any other person has a better right than the said Cocke, and in consequence of such better right, he shall lose the land, then the said Shepperd is to pay to said Cocke the above sum of *l*666 13 4, with lawful interest from this day; and in proportion should he lose any part thereof: Then the above obligation is to be void, otherwise to remain in full force and virtue.

(527) Witness my hand and seal this 1st day of February, 1802.

WILLIAM SHEPPERD. [SEAL.]

Teste: H. SHEPPERD."

The declaration charged, that another person, to-wit: James Mulherin, had on the 1st day of February, 1802, a better right than either William Cocke or William Shepperd to one of the six hundred and forty acre tracts; and that in consequence of such better right, Wm. Cocke had lost the said tract. The Defendant pleaded that "he had not broken his covenants, and that the conditions had been performed."

The Jury found that there was a breach of the covenants as to one of the tracts of land, which William Cocke had lost by a better title thereto being in James Mulherin on the 1st February, 1802. They further found that the Defendant, Shepperd, had performed the conditions contained in his obligation, by paying to the Plaintiff the sum of 437*l.* 10*s.* as and for the price of the land so lost.

Upon the trial, the Plaintiff proved that the value of the tract of land lost, was, on the 1st February, 1802, one dollar per acre; and the value of the other two tracts mentioned in the obligation was, on that day, one, thirty-seven and a half cents, the other, twenty-five cents per acre. That at the time of bringing this suit, the value of the tract lost was five dollars per acre, and the value of one of the other tracts was one dollar and twenty-five cents, and the other, fifty cents per acre.

Neither Shepperd nor Cocke had seen the lands before the 1st February, 1802, and both were ignorant of their quality. Upon these facts, the Plaintiff's counsel moved the Court to instruct the Jury that the Plaintiff was entitled to recover such a portion of the purchase money, with interest, as the value of the tract lost bore to the value of the other two tracts, at the time of commencing this suit. The Court refused to give such instructions; and, thereupon it was prayed that the Court would instruct the Jury that the Plaintiff was entitled to recover, by way of damages, (528) such a proportion of the purchase money as the value of the tract lost bore to the value of the other two tracts on the 1st February, 1802. This was also refused; and the Court instructed the Jury that the Plaintiff was entitled to recover so much of the purchase money, with interest, as the *quantity* of land lost bore to the *quantity* in the other two tracts, to-wit: one-third part; and it appearing that Defendant had made payment to the Plaintiff of this amount, the Jury found, as to this point, for the Defendant. A rule for a new trial was obtained by the Plaintiff; which being discharged, he appealed to the Supreme Court; and the Judges here were divided in opinion: Hall and Henderson, Judges, being of opinion that the presiding Judge had erred in instructing the Jury, and that the rule for a new trial should be made absolute. Taylor, Chief Justice, contra.

HALL, Judge.—I have no hesitation in saying, that where a bargainee is evicted of part of the land which he has purchased, he is entitled to recover the value of such land, reference being had to its value at the time of the purchase. Thus, if A. purchase a tract of land of B. for one hundred dollars, and fifty acres of the tract be worth one dollar and a half per acre, and the other fifty acres be worth fifty cents per acre, and A. be evicted of the first fifty acres, he shall recover one dollar and a half per acre; and if he be evicted of the other fifty acres, he shall recover only fifty cents per acre, if the value of the whole land purchased was at the time of the purchase, one hundred dollars. At first, I doubted what the contract between the parties in this case really was: on consideration, however, it appears to be, that in case of eviction, by a better title, of the whole of the land sold, the purchase money, with the interest, should be returned; and the words "and so in proportion, should he lose any part thereof," mean value as well as quantity, and, therefore, that the Plaintiff is entitled to recover the (529) value of the land lost in reference to the money given for the whole: that is, if the value of the land lost be less than the average value of the other two tracts, the Plaintiff should recover less; if more, he should recover accordingly. I think the rule for a new trial should be made absoluet.

HENDERSON, Judge.—I think the bond is a mere contract, or bond of indemnity, and that all that can be claimed under it, is compensation for the value of the land lost by a better title, valuing the whole land at the price mentioned in the bond, and the part lost by its relative value thereto. As to the words "and in proportion should he lose any part thereof," I understand them to mean only, that if a part should be lost, (a whole loss being provided for before,) the part lost should be valued in relation to the value fixed on the whole. A contrary construction might lead to very unjust results. For the part lost might be entirely barren; and although it might be half of the quantity of land sold, the real injury might be inconsiderable; yet one half of the purchase money must be returned. And so *vice versa*, the valuable part of the land might be lost, and only one half of the purchase money be restored. This would be giving to the bond a construction very different from that of an indemnity. Nor does it make any difference that neither of the parties had ever seen the lands, or knew where the title was good and where defective: they acted on their knowledge, or their supposed knowledge, of the general value of the land in that country: they knew that some tracts were better than others, and parts of those tracts better than other parts. When lands are bought or sold by the acre, it rarely happens that each acre is of the same value. The average value of each acre governs the parties, and in this way the value of the whole tract is ascertained. I think the Jury were wrongly instructed, and that the rule for a new trial should be made absolute.

TAYLOR, Chief-Justice.—I think it a material part (530) of this case, that neither of the parties knew anything about the quality of any part of the land. It lay in a distant country, and the value of any one tract, rather than of the others, formed no inducement to the purchaser. If there had been a general warrantry in the deed, Cocke could have recovered only the price paid in proportion to the land lost, and interest upon that sum; according to the rule, that if upon a contract for the purchase of land the title prove bad, and the vendor is, without fraud, incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of the bargain he supposes he has lost. 2 Black. 1078. The decision of this Court, too, in the case of

Philips *v.* Smith, limits the recovery to the price fixed on by the parties, and interest on that sum.

But it appears to me that this case is still stronger against the Plaintiff, than if an action had been brought on a warranty in a deed; for the parties here have not left the sum to be recovered, to implication or the effect of any general rule of law, but have incorporated the principle, by which a reimbursement shall be adjusted, into the condition of the bond. "If it shall appear hereafter that any other person should have a better right to these lands than Cocke, and he should lose them in consequence of such better right, then Shepperd is to pay back the purchase money, *and in proportion should Cocke lose any part of the land.*" The number of acres sold was nineteen hundred and twenty, of which, one-third has been lost, and for which Cocke is entitled to a reimbursement of one-third of the purchase money, with interest. This rule is calculated to work both ways, and appears to me most equitably adapted to the circumstances of this case. It is one under which the Plaintiff would certainly have sought shelter, had Mulherrin's title covered the tract which the Jury have valued at twenty-five cents per acre, instead of that which they have valued at a dollar.

The price actually paid for the land was at the (531) rate of sixty-nine cents and four-ninths per acre; whereas taking the average value of the several tracts when the contract was made, the value of each acre would be but fifty-four cents and one-sixth per acre; and either this latter sum or twenty-five cents per acre, must have been the amount of the Plaintiff's recovery, upon his own principles, in the event of his having lost the poorest tract. If in the supposed event, it would have been unjust to allow the Plaintiff less than he paid, which I think it would, it must be equally so, to make the Defendant pay more than he received, in the event which actually has happened.

In the case of Nelson *v.* Matthews, (2 Hen. and Mumf. 164) the general rule is laid down, that if several tracts of land be sold as adjoining each other for a gross sum, and no specification be made at the time of the contract of the quality or separate value of each parcel, and there be a deficiency in the quantity of each, the purchaser will be entitled to compensation for such deficiency, according to the average value of the whole tract, and not of the several tracts taken separately. In giving the reasons why the case under consideration should be governed by the general rule, Judge Roane observes, that the purchaser does not state that the lost land formed a particular inducement with him to make the purchase: on the contrary, he had never viewed the land, but relied on the information of the seller as to quantity and boundaries; he neither asked nor received any information as to quality and description: be submits, therefore, in case of a deficiency, to stand upon the general ground, which is a safe one, as it gives the average value of an article purchased in gross. Whereas, when an enquiry is made into the relative value, a very extensive field is entered into, where much is left to opinion, and in which there are no certain *data* to go by.

It will readily be admitted that many cases may be stated, wherein the application of this rule would be alto- (532) gether unjust; as where a purchaser is evicted from the most valuable part of a tract of land, as a meadow connected with a barren field; one acre containing expensive improvements, connected with a tract of little or no value; or the only woodland belonging to a plantation, and essential to its support. When the purchaser knew the land, or it was described to him at the time of the sale, it may reasonably be presumed, that the valuable part of the tract formed an inducement with him to make the purchase; and therefore he ought to be compensated for the relative value of the land lost. 5 Johns. 57. But considering, together, the contract in this case, the ignorance of the parties as to the value of the land, and the absence of all unfair dealing in the seller, I am unwilling to disturb the verdict.

(533) THE STATE *v.* JOSEPH MARTIN *et al.*

From Wayne.

Indictment for a riot "in pulling down, breaking, removing and destroying the dwelling house of one Lucy Showell, she the said Lucy being in the peaceable possession thereof." Upon the trial, it appeared in evidence that Lucy Showell was a feme covert, but her husband did not live with her. The Defendants being convicted, the Court awarded a new trial, for

In an indictment for a riot in pulling down a *dwelling house*, as well as in burglary, for breaking and entering a *dwelling house*, the indictment must set forth whose house it is. Here it was the *dwelling house* of the husband, and should have been so charged. If a person inhabit a dwelling house, as the wife, guest, servant, or part of the family of another, it is in law the occupation of such other person, and must be so laid in the indictment.

The indictment charged, "that Joseph Martin, Thomas Durden, Joel Newsom, Isaac Newsom, together with divers other persons to the Jurors unknown, being rioters, routers and disturbers of the peace of the state, on the ninth day of April, in the year of our Lord one thousand eight hundred and seventeen, with force and arms, that is to say, with sticks, staves, and other offensive weapons, at the county of Wayne aforesaid, unlawfully, riotously and routously, did assemble and gather together to disturb the peace of the state; and being so assembled and gathered together, the dwelling house of one Lucy Showell, she the said Lucy being in the peaceable possession thereof, then and there unlawfully, riotously and routously, did pull down, remove, break and destroy, and other wrongs to the said Lucy Showell then and there did, to her great damage, and against the peace and dignity of the State."

Upon the trial it appeared in evidence, that Lucy Showell was a feme covert; that her husband had gone from the State, leaving her behind, residing in the house; that since the commission of the acts charged in the indictment, he had returned to the State, but had not since resided with (534) his wife. The presiding Judge charged the Jury, that evidence of taking down the roof of the house in which Lucy Showell resided, against her consent, supported the indictment, and that the Defendants might be convicted, although the indictment did not charge the house to be the dwelling house of the husband. The Defendants were convicted, and a rule for a new trial was obtained, upon the ground of misdirection by the Court. The rule was discharged, and the Defendants appealed to this Court.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The offence charged in the indictment is not a general riot, but a riot which consisted specifically in pulling down, removing, breaking, and destroying a dwelling house. So far it resembles the case of the Queen *v.* Soley and others, 2 Salk. 595; which was an information for a riot for taking from the hinges, the door of a certain house called the Guildhall of the town of Bewdly. In that case the judgment was arrested, because it did not appear whose house it was; and calling it a Guildhall did not make it so. In the case before us, the house is laid as the dwelling house of one Lucy Showell, and as in her possession. It appears from the case, that

Lucy Showell was, at the time of the riot, the wife of a man who was then out of the state, but who has since returned, though he does not reside with his wife. Now in the case of burglary, it is a well settled rule, that if a person inhabit a dwelling house, as the wife, guest, servant, or part of the family of another, it is in law the occupation of such other person, and must be so laid in the indictment. And this rule was strongly exemplified in Fane's case, Kelyng, 43, where it was holden, that if the house of a feme-covert, who lives apart from her husband, be broken, though the husband had expressly refused to have anything to do with the lease, and the landlord made the agreement with the wife alone, yet it must be laid to be the house of the husband. (535) There is no ground whatever on which to infer that the separate property of this house was in the wife, or that in point of law she had the exclusive possession of it. For whatever might have been alleged in favor of such a position, had the husband left the state under circumstances indicating an intention of not returning, yet in fact he has returned and the wife is consequently subject to the disabilities of coverture. As the riot laid in the indictment is not distinguishable from a burglary, so far as it respects the description of the property or possession of the house, and as, according to the case in Salkeld, the proof must establish the allegation, there must be a new trial.

SAMUEL SKINNER, executor of the last will of EVAN SKINNER, dec'd. *v.* JOHN SKINNER.

From Washington.

Construction of the 3d section of the act of 1806, relative to gifts of slaves.

The words "Every person claiming title to any slave or slaves, by virtue of any parol gift heretofore made, shall commence and prosecute his or her suit for the same, within three years from the passing of this act, otherwise the same shall be forever barred," mean that the *remedy* shall be barred, and not the *right*.

Detinue for sundry negro slaves. Pleas—non detinet, and statute of limitations. Replication—act of 1806, ch —.

In the year 1794, Evan Skinner, the testator, made a parol gift of a negro girl named Bet to his son, the Defendant. Bet had issue after the year 1794, Jim, Agg, March, Candis, Wilcox, John, Clarissa and Frank; and she and her issue remained in possession of the testator until his death, he acknowledging that they were the property of the Defendant. The negroes came to the possession of the Plaintiff, who was appointed executor of the last will of Evan Skinner, (536) and he as executor, hired to the Defendant the negroes Bet, Jim, John, Clarissa and Frank. Before the term of hire was expired, the Defendant got into his possession the other negroes, Agg, March, Candis and Wilcox, and the term of hire having expired, he refused to return to the Plaintiff any of the negroes, setting up a claim to them under the parol gift made in 1794. The Plaintiff brought an action of detinue to recover the negroes. The Defendant pleaded, "the general issue, and statute of limitations." The plaintiff replied, "the act of 1806, ch. ."

Upon the trial, the presiding Judge charged the Jury, that as to the negroes Bet, Jim, John, Clarissa and Frank, the Defendant was estopped to deny the Plaintiff's title, he having come into the possession of them by hiring them from the Plaintiff; that therefore a verdict must be given for the Plaintiff, as to them. That, as to the other negroes, the gift from Evan Skinner to the Defendant being valid, the Plaintiff was not entitled to recover. That the act of 1806 barred the action and not the title; and, as the Defendant had obtained the peaceable possession of those negroes, and without any contract with the Plaintiff, his possession ought not to be disturbed in this suit. The Jury gave a verdict as directed by the Court, and the Plaintiff having obtained a rule for a new trial, and the rule being discharged, the Plaintiff appealed to this Court.

HENDERSON, Judge.—I have labored in vain to discover a substantial difference in the wording of the act of 1806, respecting the limitation of time within which actions shall be brought on parol gifts of slaves theretofore made, and our common act of limitation of actions; and the construction uniformly put on the common act of limitations, being that it affects the remedy only, and not the right, or that possession aids only in repelling a claim, and not in shewing a right, I am constrained to put the same construction on the act of 1806. But I well remember, when on the (537) Circuit Bench at Person Superior Court, I decided that the act of 1806 barred the right, and not the remedy only. I then thought the construction right; but on a full examination, I am induced to think I was wrong. I think the construction which I feel constrained to put upon the act, fraught with evil consequences; but I cannot make the law. These evil consequences, in all those cases where an action of replevin will lie, may be avoided by bringing that action. In it the Defendant or avowant becomes the actor, and the Plaintiff may plead the statute of limitations to his claim. The rule for a new trial must be discharged, and the judgment of the Superior Court affirmed.

HALL, Judge.—It is not easy to conceive for what purpose the third section of the act of 1806, ch. --, entitled "An act declaring what gifts of slaves shall be valid, and for the prevention of frauds," was inserted. I think the act of limitations, passed in 1715, answers the same purpose. The act was made in reference to a donee out of possession. It declares "that any person claiming title to any slave by virtue of any parol gift heretofore made, shall commence or prosecute his suit for the same within three years from the passing of that act, otherwise the same shall be forever barred." If the question be asked, for what shall he prosecute his suit, the answer is, for the slave to which he claims title. If the suit be not prosecuted within three years, what is to be barred? The answer is, the suit, which shall be brought after three years.

If it be said that the title shall be barred, it must also be said that the suit was brought for the *title* of the negro, and not for the negro. This construction will not suit the phraseology of the act. The Legislature might have intended to take away the right as well as the remedy; but if they have not so expressed themselves, we cannot do it for them. If this act has no other effect than the act of limitations, passed in the year 1715, we may reasonably suppose that the framers of it intended something else; but on (538) that account we are not at liberty to guess at that intention, and carry it into effect, because it is our duty to judge of laws that are made, not to legislate. If there had been no act of limitations before the one in question, I think there could be no difficulty in giving a construction to it; and I think the same construction ought to be given to it, notwithstanding the existence of that act. It does not appear to me that there are any words in the act of 1806, that contemplate a case like the one under consideration. We surely cannot collect from the act, that a longer possession than three years should work an indefeasible title in the possessor, but only that it should bar the remedy: and the remark may go for as much as it is worth, that the word *bar* is technically applied to actions and suits. The rule for a new trial must be discharged.

TAYLOR, Chief Justice, concurred.

(539)

Den on Demise of REDDICK AND WIFE *v.* LEGGAT.

From Bertie.

In determining the priority of grants, issued on the same day, the number marked on each will be regarded and looked to, when there is no other circumstance. The number is no part of the grant; and therefore where two grants issued on the same day, and the one of the lowest number called for the lands covered by the other, this last shall be deemed the prior grant.

Boundary is a question of fact, or at least of law and fact combined, and to be decided by the Jury and not by the Court.

It is the province of the *particular* description to abridge and limit, but not to enlarge the *general* description.

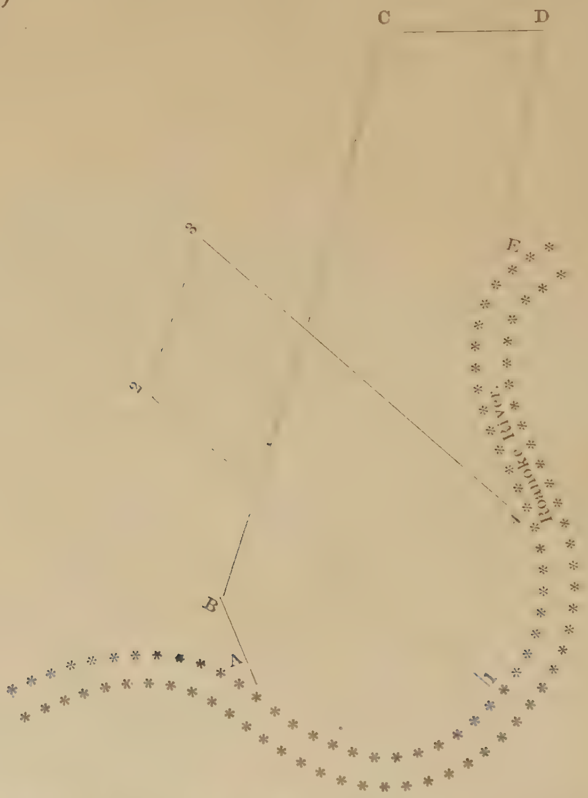
Where the thing referred to has no *particular name*, and there are superadded to the general description, specifications or localities, *all* these specifications or localities must concur to point out the object, otherwise it does not appear to be the thing intended.

If one grant to S. S. one thousand acres of land *and no more*, according to certain lines which include two thousand acres, the two thousand acres pass, because the buts and bounds are more certain than the quantity. Quantity is in no way material, except where the boundaries are doubtful, and there it is a new circumstance.

Colour of title, and possession under it—possession of lands for seven years under colour of title bars the right of entry, although the possessor knew at the time he obtained his colour of title and took possession, that the lands belonged to another person. Any other construction of the act of limitations would render titles insecure, and frustrate the intention of the act.

The lessors of the Plaintiff were the heirs at law of John Swain, to whom the lands in question had been granted on the 18th day of May, 1789. The warrant of survey was issued in 1778, and the survey was made in 1784, the Defendant Leggat being one of the chain carriers. The Defendant claimed title to the lands under a grant issued to him on the same day on which the grant to Swain issued, and his grant was of a lower number than Swain's. In the following Diagram, the letters A, B, C, D, E, represent the lines of Swain's grant, A. being the beginning corner. The figures 1, 2, 3, 4, represent the lines of Leggat's grant, figure 1, being the beginning corner.

(540)



The grant to Swain calls for "three hundred acres of land lying in Bertie county, on the low grounds of Roanoke river, beginning at a Holloy on the river, Dugan's corner, running thence with his line north 80 poles to his other corner, thence north 25° east 260 poles to a cypress, thence north 80° east 100 poles to a Gum, thence south 20° west 450 poles to the river at a Sycamore, thence up the river to the first station." The Sycamore called for in the last line is at figure 1, and the line being run from the corner at D. to figure 1, will leave out of the grant a small slip of land in the bend of the river.

The grant to Leggat calls for "one hundred acres of land

(541) lying in Bertie county, in the low grounds of Roanoke river, between John Swain's and Roanoke river; beginning at a Sycamore tree, John Swain's corner on the river, thence north 25° west 254 poles to a Gum, thence north 33° east 64 poles to a Gum, thence south 25° east 254 poles to a Chestnut Oak on the river, thence up the river to the first station." The Chestnut Oak is at figure 4.

The Defendant had been in possession of the part of the land covered by both grants for eighteen years.

The Defendant contended that the lines of Swain's grant ought to be run agreeably to the directions of the act of 1777, so as to give him a water front of but one-fourth of the extent back: that if so run, the lines of the two grants would not interfere. He further contended, that as his grant issued on the same day with Swain's, and was first numbered, it was the elder grant and first to be located. And lastly, that his grant was a colour of title, and that he having had seven years adverse possession of the land, the right of entry in the lessors of the Plaintiff was barred.

The Court instructed the Jury that, as the Defendant had failed to prove any lines actually run at the time of the original survey, different from those called for in the grant to Swain, those claiming under that grant were entitled to run according to the courses and distances called for in it, and that would leave the land in dispute within the bounds of Swain's grant. That the number of the grant, marked on it by the Secretary of State, was not a part of the grant; that in the nature of things an elder grant could not call for a younger, and here the grant to Leggat recognised Swain's grant.

The Court further instructed the Jury, that if they believed that Leggat, at the time he obtained his grant, knew that it covered lands already covered by the grant to Swain, his grant was not such colour of title as, with seven years possession under it, would toll the right of entry of the lessors of the Plaintiff: that no paper writing which was founded in fraud, could operate as colour of title in favor of him (542) who was party to the fraud. That if a man obtain a grant for a piece of land which he knew had been granted to another, it was a fraud both upon the state and the individual whose land was so regranted. And the Court left it to the Jury to say, whether the circumstance that Leggat was a chain carrier when Swain's land was surveyed, satisfied them that he knew when he obtained his grant, that it covered lands surveyed for Swain: that he got a grant for land lying between Swain's and Roanoke river, and if he was a chain carrier for Swain, must he not have known that there were only a very few acres lying there? And must he not also have known that running from the sycamore the course he called for, would take him directly into Swain's lands?

The Jury found the Defendant guilty; upon which a rule for a new trial was obtained, and it being discharged the Defendant appealed to this Court.

HENDERSON, Judge, delivered the opinion of the Court:

The first question presented for the consideration of the Court, is the priority of the respective grants of the parties. Leggat's has the lowest number, but it calls for Swain's lands: the number must therefore yield to this call, and Swain's must be considered as first made. The number was then no part of the grant; it was only a mark put upon it by the Secretary for convenience, not when he countersigned, but when he revised it.

The next question, to-wit, the boundaries of Leggat's grant, is rather one of fact than of law, and dependant on a variety of circumstances, proper only for the consideration of a Jury. We will, however, examine those facts as sent here, more for the purpose of shewing that it is a question of fact, than of elucidating the points arising on the record for *our* decision.

Swain's patent, under which the lessors of the Plaintiff claim, when laid down according to its calls, leaves but a narrow strip of land, not more perhaps than ten steps (543) wide, between it and the river, and perhaps not more than fifty long: and the lands granted to Leggat are described in his grant as lying between Swain's and the river, " beginning at a sycamore, John Swain's corner on the river, thence north 25° west 254 poles to a gum, thence north 33° east 64 poles to a gum, thence south 25° east 254 poles to a chesnut oak on the river, thence up the river to the first station;" which when laid down according to its calls, runs across Swain's lands diagonally, and terminates many poles beyond Swain's back line, including of lands lying between Swain's lands and the river, not more than one-third or one-fourth of an acre. It is contended, on the part of the Plaintiff, that as Leggat's lands are described as lying between Swain's and the river, every other description of its locality must be controlled by and give way to that, to-wit, distance, courses, marked lines, corners, and quantity; and in support of this, it is said, that it is the province of the particular description to abridge and limit, but not to enlarge the general description; and Lord Bacon's 13th maxim, 2 Coke Rep, 33 Doddington's case, Cro. Jac. 22, and 8 East. 91, are relied on to support it. From these authorities, which are nothing but rules or maxims founded in common sense, it appears, that where the thing referred to, has no particular name, and there are superadded to the general description, specifications or localities, all these specifications or localities must concur to point out the object, otherwise it does not appear to be the thing intended. As if I grant all my lands in Dale, which I purchased of I. S. and which are in the tenure of I. N.; all these specifications must concur, otherwise there is nothing described. But if I grant White Acre, which I purchased of I. S. and which descended to me from my father, *White Acre* will pass, although I purchased it of I. N. and not from I. S; and although it descended to me from my mother and not from my father: it is sufficiently identified by its name, and the other descriptions are (544) not sufficient to render it uncertain. They are therefore rejected or disregarded.

This may be further illustrated thus; I grant to J. S. one thousand acres of land and no more, bounded as follows, &c. and two thousand acres are included in the lines. The two thousand acres pass, as the buts and bounds are more certain than quantity, which depends on admeasurement and calculation; and the quantity is in no way material, except in lands where the boundaries are doubtful, and there it may be thrown into the one scale or the other as a circumstance.

On the other hand, it was contended that whatever may be the effect of Leggat's grant to pass the title of the lands, it actually runs across Swain's patent in the manner before described. To prove this, reliance is placed on the course and distance, the immense disparity between the quantity called for and that lying between Swain's and the river; that by stopping at Swain's front on the river line, and running Leggat's next course and distance, his lands are thrown one-half or more into the river, and the residue on the opposite side. Now a greater part of the above are questions of fact, and which the Court cannot decide on. It was the province of the Jury to do so; and if some be rules of law and some of fact, the decision belongs to the Jury under the superintendence of the Court as regards the law, and the competency and relevancy of the evidence. In fact, boundary is a question of fact, at least of law and fact combined, and for the decision of the Jury and not of the Court.

But if the Jury were of opinion that Leggat's grant covered the lands in dispute, the next question is, does the possession of eighteen years under it, give a right, Leggat knowing at the time he entered that Swain's patent covered the land? I assume it as a fact, that Leggat had notice of the bounds of Swain's patent, because from his being a chain carrier, although it be a slight circumstance, the (545) Jury might infer that he had such notice, and the Court very properly left that circumstance to them.

Leggat is very clearly within the words of the statute of limitations, even with the addition that there must be colour of title, if the Jury believed his grant covers the land. He has had a possession for more than seven years, under a grant purporting to convey the lands to him, and which would have been operative but that the grantor had before parted with his interest. Whether he knew or not of any other title, the Legislature which passed the act of 1715, did not seem to consider material. The words are general, not in favour of those possessors who did not know of any other title. I would say that the law, as so construed, is politic and wise. On the one hand, it may be said, that no *mala fide* possessor should acquire a right, no matter how long his possession may have continued. Yet as parol evidence must be gone into for the purpose of proving the *mala fides*, and it being a thing dependent on a knowledge in the possessor, a thing which may be drawn upon him by perjury without a possibility of contradiction, the object of passing the act would be frustrated, it would tend to render title insecure. To discourage new settlements and improvements, particularly of a lasting kind, in which all countries are much interested, and more especially a new one, as ours was then and even now, would in a great degree repeal the act; and if it did not, it would damp the spirit of enterprise and improvement, which it was the intention of the Legislature to cherish and protect. But for us, as mere expounders of the law, it is sufficient to say, that there is no such exception in the words of the act; nor is there in the act anything which authorises us to say that the Legislature meant otherwise than as they have plainly expressed themselves on the subject now under consideration. Believing, therefore, that the Jury were misdirected on this point, the rule for a new trial must be made absolute.

(546)

Den on Demise of JOHN THOMPSON *v.* PHILEMON HODGES.

From Cumberland.

In ejectment for lands purchased at a Sheriff's sale under execution, the Plaintiff need shew as against the Defendant in execution only, 1st. a judgment; 2d. an execution, giving to the Sheriff authority to sell; and 3d. the Sheriff's deed.

If, therefore, in the Sheriff's deed, there be a mistake in reciting the judgment, or the execution, or the return indorsed on the execution, it is immaterial, if it appear that there was a judgment, and an execution issued thereon, giving to the Sheriff authority to sell.

The lessor of the Plaintiff claimed the land in question under a deed made to him by the Sheriff of Cumberland county. He gave in evidence a judgment obtained at December term, 1809, of Cumberland County Court, by Dew and Barnes against the Defendant, and an execution tested of March term, 1810, on which was indorsed the following return, viz. "Levied on 640 acres of land, the upper side of Little River, the land where P. Hodges lives, about 2000 acres, and not sold, by direction of the Plaintiffs." He then gave in evidence a writ of *venditioni exponas*, issued in the same case, commanding the Sheriff to sell the lands levied on. This writ was tested of June Term, 1810, and the Sheriff had returned on it, that after advertising the lands, he had sold them at the court-house on the *first day of September*, when James Atkins became the purchaser. The *Sheriff's deed* was dated the *30th day of April*, 1810, and was made to James Atkins and John Thames. It recited a judgment in favor of Dew and Barnes, against Philemon Hodges *and his securities*, and an execution issued in pursuance of said judgment, authorizing said sale. It then recited that James Atkins and John Thames became the purchasers at the sale made by the Sheriff, at a price different from that set forth in the Sheriff's return on the writ of *venditioni exponas*.

The Court was of opinion, that the Plaintiff could (547) not recover, because he had not produced in evidence the judgment and execution recited in the Sheriff's deed, but had produced a judgment and execution against Philemon Hodges only; and because the Sheriff's deed was dated on the 30th April, 1810, whereas it appeared by the Sheriff's return, that the lands were not sold till the first day of September following; and lastly, because the return on the writ of *venditioni exponas* shewed that James Atkins became the purchaser at the sale, and not he *and John Thames*, and that the price at which Atkins purchased was different from that which the deed recited was paid by him and Thames. The Plaintiff submitted to a nonsuit, declaring that he was ready to prove that the land described in the declaration was included in the levy, sale, and Sheriff's deed, and had been conveyed by Atkins and Thames to his lessor. A rule for a new trial was obtained; which being discharged, the Plaintiff appealed: And,

By the Court.—This case comes within the principles which govern the case of Den on demise of Benjamin Smith against Hanson Kelly, decided at this term. The nonsuit must be set aside and a new trial granted.

(548)

JOHN GIBBONS AND WIFE *et al.* *v.* ANDREW DUNN *et al.*

From Mecklenburg.

Testator bequeaths a slave named Nell "to his wife during her natural life or widowhood," and in a subsequent clause of his will, he says, "I desire that the negro woman Nell shall become the property of my daughters, A. and B. at their mother's death, *or* at the time that my son Thomas arrives to sixteen years of age. If the widowhood of my wife should terminate before her natural life, Nell shall remain in this place for the support of my children."

The daughters are not entitled to Nell, until both events happen, to wit, the death of the widow, and the arrival of Thomas to the age of sixteen: and the Court will construe the word *or* conjunctively, to effectuate the testator's intention.

The question in this case arose out of the will of Thomas Dunn, deceased. In the first clause of his will, he bequeathed "a negro woman named Nell and her child Esther, to his wife, during her natural life or widowhood;" and in a subsequent clause, he bequeathed as follows: "I desire that the negro woman Nell before mentioned, shall become the property of Jane Gibbons and Betsey Spratt, at their mother's (the testator's wife's) death, or at the time that my son Thomas arrives to sixteen years of age; and her increase, if any, before that time, to be equally divided among the rest of my children. And be it understood that it is my will, that if the widowhood of my wife should terminate before her natural life, the above named negro Nell shall remain in this place for the support of my children who may live here." The son Thomas having arrived at the age of sixteen years, Jane Gibbons and Betsey Spratt, with their husbands, claimed Nell and her children born *after* Thomas' arrival to the age of sixteen years; and filed a petition against the executors of the testator, praying that they might be decreed to deliver the negroes to them. The executors filed their answer, and therein insisted that the true intent and meaning of (549) the testator, as to the negro woman Nell, was, that she should not go over to the petitioners until both of the events named in the will, to-wit, the death of the widow *and* the arrival of Thomas to the age of sixteen years, should happen; and that the widow was still alive. The Court was of this opinion, and dismissed the petition. The petitioners appealed to this Court.

HALL, Judge.—In the first clause of the will, relative to the negro Nell, the testator gives her to Mary his widow, during her widowhood or natural life; in the next clause wherein he speaks of her, he does not say expressly, how long she shall remain where he lived, but no doubt he meant until Thomas should attain the age of sixteen years. If, however, the mother's widowhood had not expired when Thomas arrived to the age of 16 years, she stood in as much need of Nell's services for support as before. In such event, the testator made no provision for the support of his children out of her services, because he no doubt expected that the mother, who was to have a maintenance out of the produce of the plantation where he lived, and the children would live together. It seems to me, that considering the first clause where the negro Nell is given to the widow during her natural life or widowhood, with the latter clause, the true construction is, that she should belong to the widow during her life or widowhood, but that after her death, or after the termination of her widowhood, provided his son Thomas should have attained the age of sixteen years, she should become the property of his daughters, Jane Gibbons and Betsey Spratt. The petition must be dismissed with costs.

TAYLOR, Chief Justice.—From a consideration of all the parts of this will, it appears satisfactorily to my mind, that the testator did not intend that Nell should become the property of his married daughters, until after the happening of two events, to-wit, the death of his wife, and the (550) arrival of his son Thomas to the age of sixteen years. His wife was to be supported out of the plantation, as long as she lived or remained a widow, and Nell was to assist in procuring that support. If his wife married again, Nell was still to continue on the plantation, to work for the children who should live there; and this would be necessary, at least until Thomas arrived at sixteen, when the testator calculated he might be better able to take care of himself. He could not intend, that his wife, remaining single, should be deprived of such assistance as Nell might afford her, as soon as Thomas reached sixteen; nor that Thomas and the others living on the plantation, should lose the services of Nell in the event of the death of their mother before that period. She might have died immediately after the death of the testator, when Thomas was of very tender years. The different parts of the will are to be reconciled, and the manifest intent of the testator effectuated, and by reading the word "*or*" conjunctively, as if "*and*" had been written, which it is allowable to do, according to the cases collected in 2 New. Rep. 38. I am of opinion the petition should be dismissed.

HENDERSON, Judge, concurred.

(551)

Den on demise of JAMES ORBISON *v*. GEORGE MORRISON.

From Iredell.

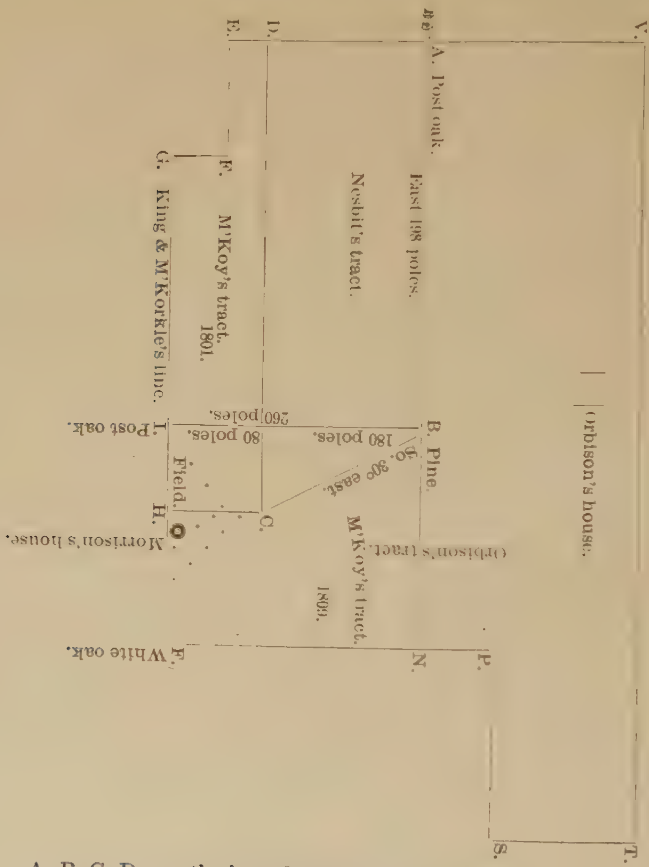
Questions of boundary, like all other questions of fact, depend on their own particular circumstances, where every shade of evidence, and every the most minute circumstances produces its effect. The artificial rules respecting boundary are intended only as guides in the application of circumstances, and not as fixed laws, to be applied indiscriminately to all cases. The injustice complained of in our boundary decisions, has been produced by considering these artificial rules, not as mere guides, but as fixed laws, and applying them indiscriminately to all cases, whether they fit them or not.

It is the province of the Court to expound to the Jury the law connected with the facts under discussion, but not to express an opinion on the facts. If, therefore, the Court express an opinion on the facts, a new trial will be awarded.

The grant under which the lessor of the Plaintiff claimed the lands, was issued in 1779, and described them as adjoining the lands of Nesbit, King and M'Korkle. The beginning corner was a post oak on Nesbit's line; thence along his line 198 poles to his corner, a pine; thence south 260 poles to a post oak; thence east to a white oak; thence north, &c. A south course from the pine corner runs directly *across* Nesbit's tract of land, a distance of 180 poles, and extends thence 80 poles to King and M'Korkle's line.

Nesbit's line from the pine corner runs south 30° east 190 poles to a Hickory; and if this course be continued to King and M'Korkle's line, it will pass to the east of the field of which the Defendant has possession. The Defendant contended that the lessor of the Plaintiff was bound to pursue this course, and that the law would not permit him to run across Nesbit's land, and extend his line beyond it, nor to turn from Nesbit's corner Hickory, west along Nesbit's line, to a point where a line drawn from Nesbit's corner pine would cross it, and thence south to King and M'Korkle's line: and if the law be in his favor on this point, he was not guilty of the trespass and ejectment charged in the declaration. The Court adjudged this point against the Defendant.

The Defendant then alleged that he had been (552) seven years and more in the actual possession of the lands, claiming them adversely and under cover of title; and he offered in evidence two grants from the State, one bearing date in 1801, which covered part of the lands claimed by the lessor of the Plaintiff, and another bearing date in 1809, for other parts of said lands adjoining those covered by the grant of 1801. The following diagram shews the boundaries called for in all the grants mentioned in the case, and also shews Nesbit's lines and King and M'Korkle's line:



A. B. C. D. are the boundaries of Nesbit's tract.

(553) G. F. is King and M'Korkle's line.

A. B. E. F. P. S. P. V. are the boundaries called for in the grant to Orbison.

D. C. H. G. F. E. are the boundaries called for in the grant to M'Koy, issued in 1801.

B. C. H. F. N. are the boundaries called for in the grant to M'Koy, issued in 1809.

B. I. is the line which runs *across* Nesbit's tract of land.

When the surveys were made for the grants which Defendant offered as colour of title, no lines nor courses were marked; each grant called either for the corners and lines of old surveys, or for course and distance to stakes. These grants were not registered until after the expiration of seven years or more from the time Defendant took possession, nor until within a year or two before the trial of this suit; nor was it known until about the time said grants were registered, that they were in existence.

The Defendant, about ten years ago, erected a house near the south line of the two tracts covered by the said grants, the same being also the line of King and M'Korkle. The Defendant took possession of the house, and has lived in it ever since, as tenant to M'Koy, the grantee. He had cleared a field containing about fourteen acres, part on the tract covered by the grant of 1809, and part on that covered by the grant of 1801.

Five years before the institution of this suit, the lessor of the plaintiff, who had been living on the northern part of the tract covered by his grant, for twenty years and more, employed a processioner, and with the processioner, entered upon the lands in dispute, claiming them as his own, and had the boundaries of his tract processioned, as the act of Assembly directs. The Defendant and his lessor, M'Koy, were with him during great part of this survey, and during the survey of that part of King and M'Korkle's line, which Morrison's field adjoins.

The Defendant entered into the common rule, and defended as to all the lands covered by the grants of 1801 and 1809, and which were covered by the grant to the (554) lessor of the Plaintiff; and insisted that his possession, for more than seven years, under the colour of title which he had offered in evidence, had barred the right of entry of the lessor of the Plaintiff, not only as to the lands included in his, the Defendant's, fence, but as to all the lands in dispute.

The Court charged the Jury, that the possession which is to bar the right of entry, must be an actual possession of at least part of the lands covered by the colour of title under which the possession is held; that this possession must be accompanied with a claim, notorious in the neighbourhood, to the boundaries called for in the colour of title: that the law required title to accompany possession, in order to shew the extent of the possessor's claim; and that it was necessary not only that the possessor should make known his colour of title for the space of seven years, but should also make known during the same time, the boundaries therein called for: this he might do, either by shewing his deed or grant to his neighbours, and pointing out his lines, or by registering his deed or grant, and giving notice that he held under it. That in this case, the Defendant had done neither: his possession was known to the neighbourhood, it was true; but he had given no notice that he claimed the possession under colour of title, nor had he made known the boundaries to which he claimed, and to which he wished his colour of title to avail him: that, therefore, his possession had not barred the right of entry of the lessor of the Plaintiff, even as to the lands included in his fence.

The Court also charged, that the entry upon the lands and survey of the boundaries made by the lessor of the Plaintiff five years before, had defeated the Defendant's possession, so that no bar had been created.

The Jury gave a verdict for the Plaintiff. A rule for a new trial was obtained, and it being discharged, the Defendant appealed.

HENDERSON, Judge, delivered the opinion of the (555) Court:

It is the province of the Court to expound to the Jury the law connected with the facts under discussion, but not to express an opinion on the facts, much less to decide them. The boundaries of deeds and grants are questions of fact, or at least, of law and fact combined, and belong exclusively to the Jury.* It was an error therefore in the Judge to undertake to decide that the second line of the lessor of the Plaintiff's patent run from B. to I: and if it was a conclusion of law drawn from the facts, it does not appear that even those subordinate facts were either admitted or found by the Jury. Besides, were we here to act the part of the Judge below, we have not the evidence which the case no doubt affords. It is not shewn whether there are marked trees from B. to I, and if there be, at what time and on what account made; whether they correspond with the date of Orbison's deed, whether there is a post oak marked as a corner at I. its date, &c. whether there are marked trees between I. and H. whether there are marked trees on the dotted line from C. to where it intersects M'Korkle's line, whether there is a post oak marked at its intersection, and whether Nesbit's line B. C. was openly and notoriously known in the neighborhood, when Orbison obtained his grant, or if it had only that notoriety which ordinary wood lines have. All these are facts bearing on the question, "how does Orbison's second line run?" which we have no means of knowing, and which the Judge below, and of course we, have no right to pass on. It is by an adherence to these artificial rules found in our books, and considering them as fixed laws, and applying them indiscriminately to all cases, whether they fit them or not, that such monstrous injustice has been done in our boundary decisions; at many times embracing several thousand acres, when only a few hundred were contemplated by the parties. The fact is, that questions of boundary, like all other questions of fact, depend each on their own particular circumstances, where every shade of evidence, and (556) every the most minute circumstance, produces its effect; and we might almost as well attempt to lay down rules of presumption to guide the conscience of a Jury, as rules by which boundary shall be ascertained. The sole question is, where do the lines called for in the deed or patent, actually run? I am far from saying that I, as a Juror, would have decided even from the evidence appearing upon the case that is sent here, differently from what the Judge did; but I think he had no right to decide at all—The rule for a new trial must be made absolute.

Den on the Demise of WILLIAM TATE'S HEIRS *v.* EPHRAIM GREENLEE.

From Burke.

Boundary is a question of fact, or of law and fact combined, and proper only for the decision of the Jury. If the presiding Judge in his charge to the Jury intimate an opinion as to the fact, it is a good ground for a new trial; for the act of 1796, ch. 4, declares, "that it shall not be lawful for any Judge in delivering a charge to the Jury, to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the Jury."

The Defendant claimed title to the land in question, under an older grant than that under which the Plaintiff claimed; and the question between the parties arose from the boundaries called for in the Defendant's grant. This grant called for six hundred and forty acres, "lying in the county of Burke, on the waters of Silver Creek, bounded *by lands of his own* (Greenlee,) John Bowman, John Mackey and Job Morgan: beginning at Bowman's south east corner black oak, thence with Mackey's land south 23° east 354 poles to a post oak on the side of a ridge, thence east 230 poles to a pine on the side of the road leading from Burke to Broad river, thence north 68° west 89 poles to Morgan's corner black oak, thence north 18° east 92 *poles to a stake,* thence west 295 poles (557) to a stake, on Bowman's line, thence south 46 poles to the beginning." The question was where the *fifth* line should terminate? If it terminate at the distance called for in the grant, no part of this tract will adjoin *other lands* of the Defendant (Greenlee,) nor will any part of the lands claimed by the lessors of the Plaintiff be covered by the Defendant's grant. If the fifth line be extended a considerable distance beyond that called for in the grant, it will reach a tract of land belonging to the Defendant, and the Defendant's grant will cover the lands claimed by the lessors of the Plaintiff.

The Court charged the Jury, that the fifth line terminated at the end of the distance called for in the grant. A verdict was found for the Plaintiff; and a rule for a new trial being obtained, and on argument discharged, the Defendant appealed.

HENDERSON, Judge, delivered the opinion of the Court:

From the case it appears that the Judge charged the Jury that the fifth line of the Defendant's grant terminated at the end of the distance. From viewing the grant and the plat only, it is quite probable that we as Jurors would arrive at the same conclusion. But, as has been frequently said during the present term, boundary is a question of fact, or of law and fact combined, and proper only for the decision of the Jury. For the purpose of giving the decision of the question to the proper tribunal, there must be a new trial. The case of Reddick and wife *v.* Leggat, and Orbison *v.* Morrison, decided at this term, and of Cherry and Slade, decided at the last term, contain a more full view of the principles which govern the Court in this case.

NOVEMBER TERM, 1819.*

(558)

Den on Demise of JOHN STEVENSON *v.* JONATHAN H. JACOCKS.

From Perquimans.

Although the validity of an executory devise is to be tested, not by the event, but by the words which tie up the happening of the event, so that if the event happen at all, it must be within the prescribed time; yet, to claim under such devise, it must be shewn that the contingency has happened within the period prescribed, or as the testator directed. Therefore,

Where a testator directed, that upon the failure of the issue of his two sons, parts of the lands devised to them should be rented out for the benefit of his daughter during life, and after her death to her children, and another part of the lands at the same time to pass to I. S. If the limitation to I. S. be deemed good, yet he cannot recover the lands, without shewing that the issue of the sons had failed in the life time of the daughter.

This was a special verdict, in which the Jury found, that Thomas Stevenson, being seised and possessed of the lands in dispute, by his last will duly executed to pass his real estates, devised as follows; "I give and bequeath unto my son, William Stevenson, the land and plantation whereon I now live, called Stevenson's Point. containing four hundred acres, more or less, reserving the tract lent to my wife during her life. I also give to my son William the land I bought from the executors of William Humphreys, deceased; also fifty-three acres of land on the west side of Duck Creek; reserving and excepting nevertheless, and it is the true intent and meaning of this my last will, that in case the child which my wife Elizabeth is now pregnant with should be a male, my will and desire is, that the part of my land and plantation which is lent to my wife during her life (559) as aforesaid, should descend at the death of my wife to the same child she is now pregnant with, in case it should be a male, to him and his heirs forever. Further it is my will and desire, that in case of the death of my son William, or the death of the child which my wife is now pregnant with, if a male, my will and desire is, that the survivor shall have the whole of the estate mentioned herein to them both, if either should die without lawful issue. But in case of the death of them both without lawful issue, then it is my will and desire that John Stevenson, son of Hugh Stevenson, should have that part of my land, which was my mother's dower; and the other part of my said land to be rented out annually for the benefit of my daughter Polly Stevenson during her natural life; and in case she, my said daughter Polly, should have lawful issue, my will is, that such lawful issue should have and enjoy the said land forever; but in case my said daughter Polly should die without lawful issue, then my will is, that the said land shall be rented out annually, and the money arising therefrom be equally divided among the sons of my sister Parthena Wyatt." That Thomas Stevenson died in 1801; that William Stevenson, the devisee, died in 1806, intestate and without issue; that the child with which the testator's wife was pregnant at the time of making the will, was afterwards born a female, and is the wife of the Defendant, Jonathan Jacocks; that she is the sole heir at law of Thomas Stevenson, the testator, and also of William Stevenson, the devisee; that John Stevenson, the devisee named in the will, is the lessor of the Plaintiff; that the premises claimed by him in this suit are the same devised to him, being a part of those devised to William in the first recited clause.

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*All the cases from page 428, inserted under the head of May Term, it is found were decided at November Term, and ought to have been under this head.

The Jury having prayed the advice of the Court, judgment was given for the Plaintiff, and the Defendant appealed.

HENDERSON, Judge, delivered the opinion of the (560) Court:

The words *dying without issue*, per se, by a long course of Judicial interpretation, means an indefinite failure of issue, and a limitation thereon is void as an executory devise; but if, from expressions in the will, it appeared to be the testator's intent to tie up the contingency to the period allowed by law, to wit, a life or lives in being, and twenty-one years and nine months thereafter, to wait for the full age of a posthumus child, those indefinite words have been restricted by such expressions, and the devise over held good. In this case, upon the failure of the issue of William, and the child of which his wife was pregnant at the date of his will, part of the lands given to them were to be rented out for the benefit of his daughter during life, and after her death, to her children; the other lands at the same time to pass to the lessor of the Plaintiff. This, it was alleged, tied up the contingency to the prescribed period; for, it is said, if the devise take effect at all, it must be during the life of the daughter. Allowing this argument to be sound, and the devise over good, (which in this case may be very much doubted,) the Plaintiff cannot recover, for want of shewing that the issue of the sons failed during the life of the daughter; for it is by tyeing up the devise over, so as to take effect in her life time, that it can be held good. It must be read thus to make it good, "And if my two sons should die without issue living, my daughter Polly," then, &c. for although it be true, that the validity of the devise is to be tested, not by the event, but must be tied up by the words of the will, so that if it happen at all, it must be within the prescribed time, yet to claim under it, it must most assuredly be shewn, that the contingency has happened within the period prescribed, or as the testator has directed. In this case it not appearing that the issue of William failed during the life of Polly, (for it is not found, whether she be dead or alive) the lessor of the Plaintiff has not shewn any title.

It is taken for granted, that this will was made (531) since 1784, when the act passed converting estates tail into estates in fee, by the operation of which act, John Stevenson, the lessor of the Plaintiff, would have taken an estate in fee, and by which the case would be much more favourable for the Plaintiff; as then it would have appeared that the contingency happened within the period prescribed, and it is also a much stronger circumstance to tie up the indefinite failure of issue, as there is no ulterior limitation of the lands devised to him.

The case of Jones *v.* Spaight was quoted at the Bar in the argument of this case; but its principles are not involved in this case. It was decided on great consideration, and with a full knowledge of all the decisions on the subject. I then entertained not a doubt of its correctness, and its accordance with the principles of English decisions. I have frequently since reflected on it, (for it was a little complained of) and have weighed it maturely since the argument in this case. My opinion of its correctness remains unshaken.

The judgment of the Court below must be reversed, and judgment rendered for the Defendant.

(562)

Den on the several Demises of RICHARD JONES and TAMERLANE JONES v. RICHARD PUTNEY, sen.

From Northampton.

Colour of title. A Sheriff's deed, which recites the execution under which the lands in dispute were sold, as having been tested and signed by the deputy clerk, shall enure as colour of title. For although the Constitution declares, that all writs shall bear teste and be signed by the clerks of the respective courts, yet a writ of execution is not necessarily void because it bears teste and is signed by a deputy clerk; because the act of 1777, ch. 2, sec. 95, provides that in the event of the death of the principal clerk, the deputy shall sue out writs and other process.

William Jones, being seised of the lands in dispute, made his last will, duly executed to pass his real estates, and therein devised as follows, "I lend unto my son Richard Jones, during his natural life, and during his wife Sarah Jones's widowhood, all my lands lying on the north side of Burwell Gilliam's spring branch, and on the north side of the north prong of Canoe creek; and if the said Richard Jones should die without lawful issue, I give the above mentioned tract of land unto my grandson, James Johnston, to him and his heirs." The testator died in 1784, and Richard Jones, the devisee, took possession of the lands, and continued in possession until the summer of 1804, when Richard Putney, junior, recovered a judgment against said Richard Jones, in Northampton County Court, for *l*73 18 4, and costs of suit; an execution was issued thereon, directed to the Sheriff of Northampton, commanding him that of the goods and chattels, lands and tenements of said Richard Jones, he cause to be made the said debt and costs. This execution was levied on the lands in dispute, and at the sale, Richard Putney, senior, the Defendant, became the purchaser. The Sheriff executed to him a deed for the lands, and he entered and took possession, and hath retained possession ever since. Richard Jones, the devisee, died in 1812, intestate, (563) and the lessors of the Plaintiff were his issue, and only heirs at law.

At the time the execution issued, Eaton Haynes was the clerk of Northampton County Court, and Richard W. Freear was his deputy. The execution was tested by Richard W. Freear, "deputy clerk," and signed by him as deputy clerk. The Sheriff's deed recited the execution as "tested by Richard W. Freear, deputy clerk." The questions made upon the trial of the case were, 1st. Whether Richard Jones took an estate for life, or in fee, under the will? and 2d. Whether, if he took an estate in fee, the title was divested out of him and vested in the Defendant, by virtue of his possession and the colour of title accompanying it? The case was sent by consent to this Court.

Mordecai, for the lessors of the Plaintiff.—The intention of the testator, however defectively expressed, shall prevail, provided the object be warranted by the rules of law (Co. Lit. 379, in note. Id. 329); and when it is said, that wills must be consistent with the rules of law, the observation is not applied to the construction of words, but to the nature of the estates themselves. 2 Atk. 580. It is apparent that the intention of the testator was, that Richard Jones should have an estate for life only, with remainder in fee to his children. First, the term *lend*, shews that he was only to have the *use*. Secondly, it is restrained to his natural life. Thirdly, a provision is made for his wife, because, he having only the loan for life, she could not be endowed; and fourthly, when he intends to pass the absolute ownership, he "*gives*" to his grandson; he desires that all that he has *lent* to his son should belong to *such* issue.

This being the manifest intention, it should prevail, as there is nothing in the nature of the estate which is forbidden by law. Shall the father take an estate of inheritance, where only an estate for life is expressly given to him? (564) The words "If the said Richard shall die without lawful issue," will not enlarge the express estate before given. 2 Dyer 171, a. 3 Do. 330, b. Cro. Eliz. 248. 1 P. Wms. 54. 1 Ld. Raym. 203. Willes 356. The rules which govern such cases are, "*expressio unius est exclusio alterius*," and "*expressum facit cessure tacitum*."

There are cases in which an implication may be allowed to enlarge an estate expressly limited for life, into an estate of inheritance; but this is done only to fulfil the *general* intent of the testator, to which his *particular* intent, inconsistent therewith, is made to bend. 1 Burr. 38. Now in this case, if the devise were "to Richard for life, and if he should die without issue, then to J. Johnston," it would be right to disregard the particular intent, to promote the general intent: for, the issue of Richard being preferred to Johnston, and there being no express devise to them, they could take only by giving their father an estate tail; and then, to promote the general intention of the devisor, Richard would take an estate tail by implication. But here there is no such necessity, for there is an express estate to the issue. 2 Bro. Ch. Rep. 553.

The express estate given to the issue, will not unite with the estate for life, so as to give Richard Jones an estate tail. The rule in Shelly's case, having been introduced for reasons which have ceased, is only adhered to in cases literally within it; where there are circumstances to take the case out of it, it is departed from in favour of intention. 2 Burr. 1107. By that rule, where a freehold is limited to the ancestor, and a remainder, either mediate or immediate, to his heirs, by the same conveyance, the word *heirs* shall operate as a word of limitation, and not of purchase. But even where the word *heirs* is used, it is, when explained by other words, taken to be a word of purchase. In Archer's case, 1 Co. 66, the words were, "to A. for life, and to the next heir male of A, and the heirs male of the body of such next heir male." Yet
(565) "*heir*" may be a word of limitation. Co. Lit. 20, a.
In Lowe *v.* Davis, (2 Ld. Raym. 1561) the devise was, "to J. S. and his heirs, lawfully to be begotten, that is to say, to his first, second and third sons;" J. S. took an estate for life. And in Lisle *v.* Gray, (2 Levinz. 223) the deed was "to Edward for life, remainder to the first son of Edward in tail male, remainder to the second, third and fourth sons of Edward in tail male; *and so to all and every the other heirs male of Edward.*" Edward took a life estate only.

But a devise to *issue* is not within the rule. Issue is not properly a word of limitation. A deed to A. and *his issue*, gives only a life estate. It is only from indulgence to testators, who are supposed *inopes consilli*, that it operates as a word of limitation. Willes 351. The case of Doe on demise of Cooper *v.* Collis, (4 Term 299) Findley's lessee *v.* Riddle, (3 Binney 139) Loddington *v.* Kyme, (Ld. Ray. 203) and Backhouse *v.* Wells, (4 Bac. 273) differ from that before the Court in this, that words of limitation are superadded to the devise to the issue. But this is immaterial; for if the word "*heirs*" had been used, superadding words of inheritance would have no effect. This was decided in the case of Minshall *v.* Minshall. 1 Atk. 411. The decision was founded on the word *issue*, not on the superadded limitation. If these words be material in England to give the issue an estate of inheritance, and therefore, where they are wanting the ancestor shall take an inheritance to comply with the general view of the testator, in this state they are not necessary, as the issue takes a fee under the act of 1784, c. 22.

If Richard Jones took any estate of inheritance, it was an estate tail. There is no such estate given to him, unless the Court disregard express words, and have recourse to implication, or unless they give to the words "issue, &c." an unnatural sense. Implications are only indulged to fulfil the *intent;* improper terms, used by testators, are also (566) indulged with the same view. But such indulgences will not be allowed, where the effect must be to create an estate contrary to the declared policy of the government, (Bill of Rights, sec. 23. Constitution 43,—Act of 1784, ch. 23) much less will a construction be made, manifestly thwarting the expressed legal intention of the testator.

But, if in England, these words would make an estate tail, the construction here will be different. In England, where words are used in the bequest of a term, which would give an express estate tail in real estate, the whole interest vests in the first taker; where they do not give an express estate, the Court will consider the intention. Doe *v.* Lyde, 594. In this case, no *express estate tail* is given: on the contrary, it is express estate for life, and if it were the case of a *term*, there could be no doubt on the authority of the case of Doe *v.* Lyde; and the case of Jones and wife *v* the heirs of Spaight shews there is no difference in the construction in this state. 1 Law Repos. 544.

HALL AND MURPHY (who sat for Judge HENDERSON), Judges, declined giving any opinion upon the first question made in this case. Upon the second question, they were of opinion that the Sheriff's deed to Putney was colour of title, and he having had seven years possession under it, the right of entry in the lessors of the Plaintiff was barred.

TAYLOR, Chief-Justice.—The questions arising in this case are, whether Richard Jones acquired a fee simple in the land under the will of his father, William Jones; and if he did, then whether the title was divested out of him and vested in the Defendant by virtue of his possession and the colour of title accompanying it. It is impossible to read the will, and to doubt that the intention of the testator was to give to

Richard Jones an estate for his life only. It is equally clear that he intended no benefit to be enjoyed under the devise to his grandson, James Johnston, as long as there (567) were any issue of Richard Jones remaining. This was the general intent, to which the other, the particular intent, must give way, where it is impossible to reconcile them. That cannot be done in this case, for the issue of Richard Jones can only take by a descendible estate being vested in their ancestor: and in giving this construction to the will, the Court do no more than the testator himself would probably have done, had he been aware that his general object could not have been attained, without giving up his particular intent. If the issue were held to take by purchase, then, upon the death of one, his share would go over to James Johnston; which certainly was not intended by the testator. This consideration, when coupled with the act of 1784, ch. 22, shews clearly that Richard Jones was tenant in fee simple of the land sued for.

The objection made to the colour of title set up by the Defendant is, that the Sheriff's deed recites the execution under which the land was sold, as having been signed by the deputy clerk, and being, therefore, void upon the face of it, could not enure as colour of title. One general ground, on which it has been held that a colour of title is necessary, where a party relies upon the statute of limitations is, that the act did not intend to protect those who knowingly took possession of another's lands, and sought to acquire a title by continuing a trespasser for seven years. Whether that principle be correct, or whether a person can in any case fortify his possession by a colour of title, which purports on its face, that the alienor had no right to convey the land, I leave as questions to be settled as they arise. But I think it may be affirmed, without hazard, that a deed may operate as colour of title, which does not necessarily purport the want of authority in the seller to convey, or which may in truth be consistent with such an authority. A man purchasing at a Sheriff's sale, under an execution issuing from his own judgment, may be thought *prima facie* to have reasonable ground to believe that the Sheriff has a right to sell; and this presump- (568) tion ought to remain, at least, until he is instructed by the Sheriff's deed, that the authority to make the sale was void under all its circumstances. If any case can be stated, wherein the execution might be signed by the deputy clerk, it may be intended that the purchaser believed that case to have happened, when he received a deed from the Sheriff. It makes no difference, that it now appears to the Court, that such a case had not happened, for the enquiry turns not upon the *fact*, but upon the purchaser's *belief*. Such a case is provided for by the act of 1777, ch. 2, sec. 95; and there is nothing to bring home to the purchaser, a knowledge that the principal clerk was alive at the issuing of the execution. This case, therefore, is not to be distinguished from that of a person, who enters upon the possession of land, believing that he has a right to do so; and as he claims under a deed, which, for anything appearing to the contrary, announced to him the rightful exercise of an authority in the Sheriff to sell, it must amount to a colour of title. Upon both grounds, therefore, I think there ought to be judgment for the Defendant.

(569) JAMES COWAN *v.* MOSES GREEN.

From Mecklenburg.

A case being sent to this Court upon a particular point, and this Court upon looking into the record discovering that there were other material points arising in the case and connected with its merits, declined deciding the point sent up, and awarded a new trial, that all the circumstances relating to the points discovered by this Court, might be examined in the Court below.

In an action of detinue for a slave, brought by a mortgagee against a purchaser from the mortgagor, a single question was submitted to this Court, to-wit, whether the mortgagor's possession of a slave, after the mortgage deed was executed, was fraudulent *per se* against subsequent purchasers. The mortgage deed and bill of sale to the Defendant, a purchaser, formed part of the case, and the mortgage deed appeared not to have been registered within fifty days from the time it was made, nor until after the registration of the bill of sale to the Defendant. A new trial awarded, because the merits of the case were not disclosed by the statement sent up.

This was an action of detinue for a negro slave named Letty. Plea, *general issue*. The facts of the case were, that McBryde being the owner of the negro slave Letty, conveyed her with others to the Plaintiff Cowan, in mortgage, to secure a debt which he owed to the Plaintiff. The conveyance was made on the 1st day of August, 1814, and McBryde continued in possession of the slaves, using them as his own, for a few months, when he sold three of them, for the purpose of raising money to discharge part of the debt due to the

Plaintiff. This sale was made with the knowledge and consent of the Plaintiff, who, to that end, was consulted both by the purchaser and McBryde. The other slaves remained in McBryde's possession until the year 1815, when he sold and conveyed *Letty* to the Defendant, for a full and valuable consideration paid to him. It was contended on behalf of the Defendant, that the possession of the slaves by McBryde after his conveyance to the Plaintiff (it not being set forth in the conveyance that McBryde was to continue in possession) was fraudulent in law as to a subsequent purchaser, (570) and therefore the conveyance to the Plaintiff was void as against the Defendant. It was further contended that if such conveyance was not fraudulent *per se*, yet the Jury ought to find it to be fraudulent, because the Plaintiff had suffered McBryde not only to continue in possession of the slaves, but also to use and dispose of them as his own. The presiding Judge reserved the first point, and left the second to the Jury, who found for the Plaintiff, subject to the opinion of the Court upon the first point.

Upon this statement of facts, the case was sent to this Court, and the mortgage deed to the Plaintiff and the bill of sale to the Defendant, formed part of the case. Upon looking into the case here, it was observed that the mortgage deed to Cowan, the Plaintiff, had not been registered within fifty days after its execution, nor until after the registration of the deed to the Defendant. And this Court, being of opinion that these facts, and the circumstances connected with them, ought to have been taken into consideration in deciding the case, awarded a new trial.

TAYLOR, Chief Justice, delivered the opinion of the Court: The case sent up refers to the Court a single question, whether McBryde's possession of the slaves makes the deed fraudulent and void? If it be decided that it does not, judgment is to be entered for the Plaintiff. But upon looking into the deeds transmitted with the case, it will appear that there is a still more important enquiry; for the mortgage deed to Cowan was not registered within fifty days from the time it was made, nor until after the registration of the deed to the defendant. If, by this, the Plaintiff has lost his priority, the title of the slave is not in him. So, that the merits of the case are not disclosed by the statement. It is therefore proper that there should be a new trial, for the purpose of bringing forward those other circumstances which relate to the title.

(571)   THE STATE *v.* JOHN ARRINGTON.

From Buncombe.

When a Jury returns an informal or insensible verdict, or one that is not responsive to the issues submitted, they may be directed by the Court to reconsider it; but in no other case.

Therefore, where upon the trial of an indictment for felony and horse-stealing, the Jury returned for their verdict "that the prisoner was not guilty of the felony and horse-stealing, but guilty of a trespass," and the Court desired them to reconsider their verdict, and say "guilty or not guilty, and no more," and the Jury thereupon retired, and returned a verdict of "guilty," generally, this Court ordered the first finding of the Jury to be recorded as their verdict, and the prisoner to be discharged.

Wherever a prisoner, either in terms or effect, is acquitted by the Jury, the verdict as returned should be recorded.

The indictment charged, "that John Arrington, late of the county of Buncombe, on the first day of October, in the year of our Lord one thousand eight hundred and eighteen, with force and arms, in the county of Buncombe aforesaid, one sorrel mare of the value of five pounds, of the goods and chattels of James Peck, then and there found, did feloniously steal, take and lead away, contrary to the statutes in that case made and provided, and against the peace and dignity of the State." The Defendant pleaded "*not guilty*," and the Jury, having heard the evidence, retired for a short time, when they returned into Court, and being asked whether they were agreed in their verdict, they answered "yes"; and being asked "whether they found the prisoner at the bar guilty of the felony and horse-stealing charged in the bill of indictment, or not guilty," they answered, that "they found him not guilty of the felony and horse-stealing, but guilty of a trespass." Whereupon the Court directed them to retire and reconsider the case, and return a verdict of guilty or not guilty, in manner and form as charged in the indictment, and no more. The Jury retired, and, after a few (572) minutes, returned their verdict, finding the Defendant guilty of the felony and horse-stealing charged in the indictment.

All these facts were spread upon the record, and the Defendant's counsel insisted that the first finding of the Jury was to be taken as their verdict, and, by that, the Defendant was acquitted. The Court was of a different opinion, and directed the Defendant to be whipped, as the act of Assembly directs. The Defendant appealed to this Court, and the judgment of the Court below was reversed, and the Defendant discharged.

HENDERSON, Judge.—When a Jury returns with an informal or insensible verdict, or one that is not responsive to the issues submitted, they may be directed by the Court to reconsider it: but not where the verdict is not of such description. The verdict offered in this case was a plain and explicit response upon the issue submitted, and the addition, of the Defendant's having been guilty of a trespass, did not vitiate it. It was a matter of subsequent consideration with the Court what should be the judgment. The verdict first offered will be recorded *nunc pro tunc*, and judgment entered for the Defendant. For although any larceny imports a taking without the consent of the owner, and of course a trespass, yet that taking does not necessarily import a taking with violence, so as to render it indictable. The offence found is not within the charge; the record must therefore be amended, and judgment of acquittal be entered.

TAYLOR, Chief-Justice.—The verdict first brought in by the Jury was, "Not guilty of the felony and horse-stealing, but guilty of a trespass." Had this verdict been so recorded, the judgment would have been arrested; the rule being, that a Defendant cannot be found guilty of a misdemeanor, on an indictment for felony. The verdict actually found would then have had the effect of an acquittal. It is laid (573) down in ancient books of authority, that if the Jury, through mistake or evident partiality, deliver an improper verdict, the Court may, before it is recorded, desire them to reconsider it; and a case is quoted with approbation, in Plowden 211, b. where, in a writ of conspiracy against two, the Jury found one guilty, and the other not guilty; and the Judge told the Jury that their verdict was contradictory, and that if one was not guilty, the other was not, in a charge of conspiracy; and that they had better reconsider their verdict. The Jury accordingly retired, and afterwards returned and found both guilty. Some of the harsh rules of the Common Law, in relation to criminal trials, have been gradually softened by the improved spirit of the times; and this, among others, is relaxed in modern practice, where the

Jury bring in a verdict of acquittal. It is considered as bearing too hard on the prisoner, and is seldom practiced, Hawk. ch. 47, sec. 11, 12. I think this course of proceeding is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the Jury, and that in all such cases the verdict should be recorded: although I am persuaded that they were desired to reconsider their verdict in this case, with the purest intention, and solely with a view that they might correct the mistake they had committed. The verdict first returned ought to have been recorded; and it ought to be done now, *valeat quantum valere potest.* The effect will be the same as if a verdict of acquittal were recorded; but I think it most regular to put upon the record what the Jury have found. 1 Leach 12. 2 Strange 1137.

(574) FRANCIS BROWNE *v.* WILLIAM DULA.

From Wilkes.

In a charge of forswearing, unless it appear from the accompanying words, that a judicial forswearing was meant, the Plaintiff must shew upon the record, that the Defendant alluded to some particular forswearing, which amounted to perjury.

Therefore, where the Plaintiff charged in his Declaration, that the Defendant said of him, "He swore a lie, and I can prove it," and there was no colloquium set forth of any judicial proceeding, the Plaintiff was nonsuited.

This was an action on the case, for slanderous words spoken of the Plaintiff. The declaration charged, that "Whereas, Francis Browne is a good, true, honest, just and faithful citizen of this State, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said William Dula, hereinafter mentioned, was always reputed, esteemed and accepted, by and amongst all his neighbors, and other good, worthy citizens of the State, to whom he was in any wise known, to be a person of good name, fame and credit; and whereas he hath never been guilty, nor until the time of committing the several grievances by the said William Dula, hereinafter mentioned, been suspected of being guilty of perjury or any other such crime, by means of which said premises, he hath deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy citizens of this State to whom he was in anywise known, to-wit, at Wilkes aforesaid; yet the said William Dula, well knowing the premises, but greatly envying the happy state and condition of the said Francis Browne, and contriving and wickedly and maliciously intending to injure the said Francis Browne in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbours and other good citizens of this State, and also (575) to cause him to be suspected and believed, by those neighbours and citizens, to be guilty of perjury, and that he had subjected himself to the pains and penalties, by the laws of this State, inflicted upon persons guilty of said crime, and to harrass and ruin the said Francis Browne, heretofore, to-wit, &c., then and there in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said Francis Browne, these false, scandalous, malicious and defamatory words, that is to say, "*He swore a lie, and I can prove it,*" meaning that the said Francis Browne had committed wilful and corrupt perjury; by means of committing which said several grievances, &c."

Upon the trial of the cause, the Plaintiff proved, that he and one James Allison were standing together in the street in Wilkesborough. The Defendant walked up, and addressing himself to Allison, said, "You are a good man, and I like you; but that man (pointing to the Plaintiff) is a rascal, he swore to a lie against me, and I can prove it." Allison was well acquainted with the Plaintiff and Defendant, and had heard that upon the trial of an indictmeht against Defendant in Wilkes Court, the Plaintiff had been examined as a witness for the State, and the record of this prosecution was given in evidence. The Jury gave a verdict for the Plaintiff, subject to the opinion of the Court upon the question, whether the words as laid in the declaration, were actionable. The Court was of opinion, that as the declaration did not set forth any colloquium to which the inuendo could have reference, the words as charged were not actionable; and gave judgment accordingly. The Plaintiff appealed, and

TAYLOR, Chief Justice, delivered the opinion of this Court:

It is established by a long series of cases, that to say a man is forsworn, or that he has taken a false oath, generally,

(576) and without reference to some judicial proceeding, is not actionable; and the reason is, that in the latter case a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished; in the other, a breach of morality is imputed, of which the law does not take cognizance. Cro. Eliz., 429, 788, 609, 720; 1 Com. Dig.; Tit. Action on the case for defamation; 6 Mod. 200.

In a charge of forswearing, unless from the accompanying words, it is clear that a judicial forswearing was meant, the Plaintiff must shew upon the record that the Defendant alluded to some particular forswearing which amounted to perjury. Thus, in a declaration for saying "A. B. being forsworn, compounded the prosecution," no introduction of extrinsic facts is necessary, since an indictable forswearing must have been meant. But in declaring for the words, "He has forsworn himself in Leake Court," it is necessary to shew that Leake Court was one in which the offence of perjury could have been committed. Actions of slander do not lie upon inference.

It has been held, that to accuse another of having forsworn himself, generally, is actionable, 2 Buls, 40; but it seems now perfectly settled that such an accusation is not actionable, unless it appear from the accompanying circumstances, to have meant such a forswearing, as would constitute the offence of perjury. 4 Rep., 15; 6 Term Rep., 691.

(577) JAMES RIDEN *et al. v.* JOHN D. FRION.

From Craven.

Whenever the statute of limitations is a bar to the recovery of one of the parties, it operates against the whole, because the disability of one does not save the rights of the others. The statute protects the rights of those who are incompetent to protect themselves; but where some of the parties are competent, they ought to take care of the interests of all, by prosecuting a suit within time.

This was an action of detinue for negro slaves, Lucy and her increase. Pleas, "general issue and statute of limitations." The case was, that Michael Hyman bequeathed to his daughter, Eliza Riden, a negro girl named Lucy, during her natural life, and after her death, to her heirs forever." Eliza Riden died, leaving three children, the Plaintiffs in this suit. Two of these children had been of full age more than three years after Defendant got possession of the negroes, claiming and holding them adversely: the third child was under the age of twenty-four years when this suit was commenced. The Jury found a verdict for the Plaintiffs, subject to the opinion of the Court upon the following points: 1st. Whether the will of Michael Hyman gave a life estate to Eliza Riden, in negro Lucy, with a remainder to her children, the present Plaintiffs; or an absolute estate therein, so that upon her death, it accrued to her husband who survived her? 2d. Whether the disability of one of the Plaintiffs saved the rights of the Plaintiffs against the operation of the statute of limitations?

TAYLOR, Chief Justice, delivered the opinion of this Court: It is not deemed necessary to decide the question of title arising upon the title, because the Court is clearly of opinion, that the law is against the Plaintiffs upon the statute of limitations. Wherever the statute of limitations is (578) a bar to the recovery of one of the parties, in such action, it operates against the whole, because the disability of one does not save the rights of the others. The statute protects the rights of those who are incompetent to protect themselves; but, where some of the parties are competent, they ought to take care of the interests of all, by prosecuting a suit within time. The words of the proviso relate only to the case where all of the Plaintiffs are under disability: "that if any person or persons," &c., meaning where either a single Plaintiff or several Plaintiffs are under some of the incapacities provided for.

This is the construction which has uniformly been made, whenever the question has occurred. 7 Cranch, 156; 4 Term Rep., 516; 2 Taunton, 441.

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(579)

TREMBLE *v.* the Heirs of JAMES JONES, Deceased.

From Hertford.

Proceedings under the act of 1784, ch. 11.

Liability of the heir upon the obligation of his ancestor.

At common law, if the heir was sued upon the obligation of his ancestor, it was necessary for him, in order to prevent a general judgment against himself, to confess the action and shew the certainty of the land which he had by descent. If he pleaded a false plea, or judgment was given against him by default or by confession, or upon any other ground, and he failed to shew the certainty of assets, the Plaintiff was entitled to judgment against him, and execution might issue against his other lands, or his goods, or his body.

But under the act of 1784, ch. 11, no judgment can be obtained against the heir, which in any respect can make him personally liable for the debt; the object of the act being to subject the lands of the debtor, which have descended to him.

The act of 1789, ch. 39, makes the heir personally liable, where he has sold the lands which have descended to him, before action brought or process sued out against him; and liable, only for the value of the land so sold.

Under the act of 1784, ch. 11, the heir may plead to a *scire facias* to subject to sale the lands descended, that the executor or administrator had not fully administered, that the executor or administrator had suffered judgment to be recovered, by fraud, &c. But the plea, "that the lands descended had been sold to satisfy prior judgments," is totally immaterial; and although the Jury find it true, the Plaintiff is entitled to judgment of execution against the lands descended, as if no plea had been pleaded.

This was a *scire facias* against the heirs of James Jones, deceased, to subject the lands descended to the payment of the Plaintiff's judgment. The heirs appeared and pleaded to the *scire facias*, "that all the lands which had descended to them from James Jones, deceased, had been sold to satisfy prior judgments, and that they then held no lands by descent from the said James Jones, deceased." Upon this plea the Jury found for the heirs. Tremble, the Plaintiff, moved for a judgment and execution, notwithstanding the finding of the Jury, upon the ground that the issue and the (580) finding of the Jury thereupon were immaterial: and it was referred to this Court to decide whether the motion should be allowed.

HALL, Judge, delivered the opinion of the Court:

At Common Law, if the heir was sued upon the obligation of his ancestor, in order to prevent a general judgment against himself, it was incumbent upon him to confess the action and shew the certainty of the land which he had by descent. If he pleaded "nothing by descent," or judgment was given against him by default or by confession, or upon any other ground whatsoever, without confessing or shewing the certainty of assets, the Plaintiff was entitled to judgment against him, and execution might issue against his other lands, or his goods, or his body, as it might for his own debt in case he had executed the obligation. Plow. 440. But the Plaintiff was not compellable to take such a judgment; he might suggest that the heir had such and such lands by descent, and pray execution thereof; otherwise he might have been a loser by taking a general judgment, because in that case he would be entitled only to a moiety of the lands of the heir, and it might be that the heir had no other lands except those descended. 3 Bac. Ab. Verbo, *heir* and *ancestor*. H. 2 Roll. 71, 72.

But the present is a proceeding under our act of 1784, ch. 11, which directs, that when a judgment has been obtained against the executors or administrators, and the plea of "fully administered" has been found for them, before taking out execution against the lands descended, the heirs shall be notified by *scire facias*, to shew cause why execution should not issue against them; and if judgment shall pass against the heir, execution shall issue against the lands of the deceased debtor in the hands of such heir. It is not contemplated by this act, that any judgment shall be obtained against the heir, so that in any respect he shall be personally liable for the debt; the object is to subject the lands of the debtor, which have descended to him. He is personally liable only where he (581) has sold the lands which have descended to him before action brought or process sued out against him; and then, only for the value of the land so sold, and this, by the act of 1789, ch. 39. But that is not the present case. Here, the Defendants admit that lands descended, but they do not shew in certainty, or describe what lands did descend. By not doing so, the Plaintiff would be entitled at Common Law to a judgment against them personally; or agreeably to the authority in Bacon's Abridgment, before mentioned, he might elect to take judgment against the lands descended. But under this act, he cannot take judgment against the heirs personally: he may take judgment against the lands descended, and if those lands have been sold under prior judgments and executions, the Plaintiff will proceed against them at his peril. Purchasers under such executions are not bound by the proceedings in this action, and the plea pleaded by the Defendants, is nothing more than a defence for such purchasers, which they themselves will have an opportunity of making successfully, if they be improperly molested. Besides, there may be other lands descended than those which the Defendants may have proved on the trial were sold under former judgments and executions, which lands, the Plaintiff on the trial knew nothing of; and if the verdict found in favour of the Defendants be final and binding, the Plaintiff is without remedy as to them.

The Defendants have pleaded nothing which their interest as heirs required them to plead. If the plea were proper, they have not set forth in particular what lands have descended and were sold. This, if it appeared at all, could only have been shewn in evidence on the trial, which was not sufficient The Plaintiff's case is not weakened, because he did not set forth and shew what lands particularly had descended to the Defendant. This was only necessary at Common Law, to enable the Sheriff to enquire what their annual value was before they were delivered over to the Plaintiff. That is not the case here: our act of Assembly (582) does not direct the lands to be valued, but to be sold. The heirs are at liberty to plead many pleas, when the *scire facias* is served on them, which, if true, would prevent judgment from passing against them. They might plead that the executor or administrator had not fully administered, but had assets; that the judgment against the executor or administrator was obtained by fraud, &c.: but the present plea pleaded by them cannot serve them. The Plaintiff is therefore entitled to an execution against the lands descended, as if no plea had been pleaded.

(583)

ROBERT THOMPSON and wife *et al.* *v.* THOMAS BLAIR *et al.*

From Guilford.

Possession of title deeds. Notice to purchasers. Length of time,—how it protects from an investigation of fraud.

Where land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser is entitled to all the deeds as incident to the land, to enable him to defend it.

Where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact shewing an equitable title in another, he will be affected with notice of that fact, and will not be permitted to prove that he did not read the deed, or that he was ignorant of its contents.

Where, therefore, the plat and certificate of survey annexed to a grant, shewed that the lands were surveyed for "Ruth and Jane M'Cuistion, orphans of Robert M'Cuistion," and the grant to which this plat and certificate were annexed, issued to "Jane M'Cuistion, widow," this is a fact, of which all persons claiming under "Jane M'Cuistion, widow," are bound to take notice.

Although the statute of limitations speaks of actions in the Courts of Law, yet it is the duty of a Court of Equity to infuse its spirit into their decisions, as much as can be done without violating its own fundamental maxim; it being the object of both Courts to obey the Legislative will, when expressed either directly or indirectly

The investigation even of a fraud, will not be permitted after a great lapse of time, where the Defendants be not the persons who committed the fraud, although they may be volunteers.

The rule, that trust and fraud are not within the statute of limitations, is subject to this modification, that if the trust be constituted by the act of the parties, the possession of the trustee is the possesion of the *cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a Court of Equity, or the like, the possession of the trustee becomes adverse, and the statute of limitations will run from the time the fraud is discovered.

Wherever the Legislature has limited the period for Law proceedings, Equity will, in analagous cases, consider equitable rights as bound by the same limitation.

Relief was therefore refused to "Ruth and Jane M'Cuistion," because nearly thirty years had elapsed from the time the fraud committed by "Jane M'Cuistion, widow," was discovered, before application was made to Equity for relief.

The bill charged, that Moses Ruth, of the State of Maryland, had a daughter named Jane, who intermarried with one Robert M'Cuistion, and settled in Guilford (584) County, in this State: that by her said husband, she had two children, Ruth and Jane, who, with their husbands, were the Complainants in this case: that her husband died, and she survived him, and whilst she was a widow, her father, Moses Ruth, came out to this State, and in the year 1756, purchased and procured to be surveyed, on or by virtue of a warrant before that time duly issued, out of and by the proper office, a tract of land lying in the County of Rowan, now Guilford, for the Complainants, Ruth and Jane, by the name and description of "Ruth and Jane M'Cuistion, orphans of Robert M'Cuistion, deceased:" that Moses Ruth paid the purchase money and fees for the same, or left money for that purpose with his daughter, Jane M'Cuistion, mother of the said Complainants: that at the time of the said survey, the Complainants Ruth and Jane, were infants of very tender years, and their persons and estates were under the care and custody of their mother, as their guardian, who, on the 29th day of July, 1760, obtained from the Earl of Granville, a grant of the said tract of land upon the said survey, to and in her own name, the grant purporting to be made to "Jane M'Cuistion, widow."

The bill then charged, that Jane M'Cuistion, being the widow of Robert M'Cuistion, and the Complainants, Ruth and Jane, being his orphans, and being infants, and Jane M'Cuistion being the mother and guardian, and having the care and custody of their persons and estates, and their grandfather, Moses Ruth, having obtained a warrant from Lord Granville's office, and caused a survey to be made thereupon for them, and having paid the price and fees for the land, and Jane M'Cuistion, their mother, well knowing the premises, having obtained a grant to her and in her own name, upon and by virtue of the said warrant and survey, so obtained, and made by Moses Ruth, became seised of the said tract of land, in trust and to the use of the Complainants, Ruth and Jane, and bound in Equity to convey the same to them as they should direct. (585)

That Jane M'Cuiston afterwards intermarried with Thomas Blair, who, together with the said Jane, on the 4th day of February, 1765, made and executed a deed of conveyance of the said lands, to James Archer, in fee simple, but with warranty only against the said Thomas Blair and Jane his wife, and their heirs, and all claiming under them and describing the said tract as granted to the said Thomas Blair's wife Jane, by Earl Granville, by a deed patent, bearing date the 29th day of July, 1760.

The bill then charged that James Archer at and before the time he contracted for the purchase of the said tract of land, and the time of making the deed to him, and at and before the payment of the purchase money, had full notice of the premises and of the trusts aforesaid, and so became trustee of whatsoever estate and interest passed by the deed to him and his heirs, for the Complainants Ruth and Jane, and their heirs. That Archer had since died, having previously published in writing his last will, duly executed to pass his real estate, and therein and thereby devised the lands to his sons, who were the Defendants in this case, with Thomas Blair and Jane his wife.

The bill prayed as against the devisees of Archer, a conveyance of the legal estate in the lands, to the Complainants Ruth and Jane, and an account of the rents and profits; and as against Blair and wife, that if by reason of want of notice to Archer or other equitable circumstance in his favour, the Court would not decree his devisees to convey, then that Blair and his wife be decreed to account with Complainants, and pay over to them the purchase money received from Archer, with interest.

To the bill was appended a copy of the certificate of survey with a plat thereof annexed, which Lord Granville's surveyor had returned into the proper office, and upon which the grant issued. This plat and certificate dated 10th August, 1756, set forth that the land was surveyed "for Ruth (586) and Jane M'Cuistion, orphans of Robert M'Cuistion, deceased." And a duplicate of the plat and certificate of survey was, by the custom of Lord Granville's office, annexed to the grant, and referred to in the grant.

There was also appended to the bill a copy of the grant issued upon the foregoing plat and certificate of survey, to Jane M'Cuiston, widow.

The bill was filed in 1808, and the Complainants Ruth and Jane, did not labour under the disability of coverture until after their arrival to full age. Ruth having attained to the age of twenty-one years in 1775, and Jane in 1777. That shortly after their respective intermarriages, they and their husbands asserted their claim to the lands, and commenced suit against Archer; which suit was abandoned. About the same time they commenced suit against Blair and wife; which suit was also abandoned; and in 1804, they brought an action at law against Blair, claiming the purchase money received from Archer, treating his sale to Archer as an agency on their behalf. In this suit they were nonsuited, and then they filed this bill.

Thomas Blair and wife in their answer, denied that the lands had been entered by Moses Ruth for the Complainants Ruth and Jane, that he had paid the purchase money or fees of office, or left the same with the Defendant Jane, his daughter, or that he had purchased a warrant and procured the lands to be surveyed for the said Ruth and Jane. They alleged that the entry was made in Earl Granville's office by Robert M'Cuistion, father of the said Ruth and Jane, and in his name; that after his death, the Defendant Jane, his widow, having administered upon his estate, sold the entry at the sale of the personal estate and she became the purchaser: that upon applying at the office for a grant she found the entry had lapsed, and was advised to enter the land in her own name; that her agent, whom she employed to make the entry, by mistake, made the entry in the name of her daughters Ruth and Jane; that she paid the fees of (587) office and obtained the grant in her own name. That she did not hold the lands in trust for the Complainants, &c. They insisted in their answer upon the length of time, during which Complainants had suffered their claim to lie dormant, and prayed advantage thereof.

The devisees of Archer, in their answer, referred to the answer of Blair and wife, and prayed advantage of the matters and things therein set forth; and alleged that their testator was a purchaser of the lands from Blair and wife for a valuable consideration, without notice of Complainant's equity.

The answers were replied to, and pending the suit, Jane Blair died, leaving her husband and three children her surviving. It was then discovered that she had not been privily examined, as the law directs, touching her execution of the deed to Archer; and the Complainants filed a supplemental bill and bill of revivor, and made her children parties.

The cause came on to be heard at September Term, 1817, before his Honor Judge Seawell, who directed a Jury to be impannelled to try the following issue, to wit, "whether the grant made by Earl Granville to Jane M'Cuistion, mentioned in the bill of complaint, was fradulently obtained, or not, upon an entry, to which the Complainants Ruth and Jane were entitled." The Jury found that the grant had been fraudulently obtained by James M'Cuistion upon an entry, to which the Complainants Ruth and Jane were entitled.

The case was then transmitted to the Supreme Court, upon the original and supplemental bill and bill of revivor, the answer of the Defendants and the finding of the Jury upon the issue submitted to them, for that Court to determine what decree the complainants were entitled to. It appearing in the case that the grant to Jane M'Cuistion was issued upon a survey made in the name of the complainants, Ruth and Jane. And as the grant so issued constituted a part of Defendant's title, and upon the face of it expressed to (588) be made according *to the annexed plat and certificate*, it was submitted to the Supreme Court whether Archer, claiming under this grant, should not be held and construed to have notice of the fact set forth in the said plat and certificate, to wit: that the lands were surveyed for the complainants, Ruth and Jane.

HENDERSON, Judge.—The Defendant, Jane M'Cuistion, obtained Earl Granville's deed in the year 1760; and with her second husband, Thomas Blair, sold to Archer in 1765. Archer entered, claiming the lands as his own, and continued in possession to the time of filing this bill in 1808. His possession, and that of his devisees, has been for forty-three years. The complainants, Ruth and Jane, arrived at full age more than thirty years before the filing of this bill, and if they have labored under any disability other than infancy, it has been cumulative, and ought to have been shewn by them, if they could avail themselves of it. During all this time they lie idle, and do not assert their title, except by instituting suits against Archer and Blair about the year 1779, and abandoning them, and bringing a suit for the purchase money against Blair, in the year 1804. Upon this statement of the case, we should violate the will of the Legislature as expressed in regard to legal titles, in the act of 1715, for quieting titles and limiting the time in which actions should be brought For, although that act speaks of actions in the Courts of Law, yet it is the province of a Court of Equity to infuse its spirit into their decisions as much as can be done, without violating its own fundamental maxims. For it is its only will, as that of the Courts of Law, to obey the legislative will, when expressed either directly or indirectly.

But it is said, that time does not bar a fraud, and here the Jury have found that the grant was fraudulently obtained. To which it may be answered, that even the investigation of a fraud will not be permitted after a great lapse of (589) time, where the claimants are not the persons who committed the fraud, although they may be volunteers. But certainly Equity will respect time after the fraud is discovered. The Defendants who are charged with the fraud, have not concealed the evidence of that fraud. They have annexed a certificate of survey to their deed. and placed it, together with their deed, on the public records of the country, liable to the inspection of all: and this they did at the very time their deed was obtained. It is by this entry and survey alone, that the Defendants are or can be affected with notice; and the only difference between the Complainants' and Defendants' opportunity of knowing it, is, that it forms a link in the Defendants' chain of title, and the deed is referred to in their deed. We cannot therefore but perceive, that the Complainants must long since have had a knowledge of Defendant's title; and it would contravene one of the established rules of this Court, to support a claim so stale. The bill must be dismissed.

TAYLOR, Chief-Justice.—Moses Ruth, grandfather to the Complainants, Ruth and Jane, purchased for them, about the year 1756, a tract of land in Rowan County, which was surveyed by virtue of a warrant in their names, as the orphans of Robert M'Cuistion, deceased, and either paid the purchase money, or left it with the Defendant Jane, their mother, then a widow. She, acting as guardian to her daughters, who were infants, obtained in 1760, a grant from Lord Granville, in her own name, with full knowledge that the land was paid for and surveyed for them. The Defendant Jane, intermarried in 1765, with Thomas Blair, and they executed a deed for the lands to James Archer, who, it is charged, had full notice of the preceding circumstances. James Archer died in 1799, after having made his will, and devised the lands to certain of his children. This is the statement made in the bill.

The history of the transaction is altogether different as given in the answer of Thomas Blair and Jane (590) his wife; who say, that Moses Ruth did not purchase the lands for the Complainants, Ruth and Jane, and that no money was paid to them, or any other person, for that purpose; but that the lands had been entered and surveyed by Robert M'Cuistion, in his life time, but the title was not completed, nor was there any money paid by him. That upon the sale of his effects after his death, this entry was purchased by his widow Jane, who, in endeavouring to procure a grant upon it, discovered that it had lapsed, and she was therefore obliged to re-enter it in her own name: that by a mistake of the agent, the entry was made in the name of the heirs of Robert M'Cuistion, which mistake the widow tried to get rectified, but was told it was immaterial, and that the grant would be issued in her own name, which was accordingly done: that the land was sold to James Archer, and the price paid, before her intermarriage with Thomas Blair, but that afterwards, she and her husband executed the deed to him jointly. It is further stated, that the Complainant, Ruth, was of age in 1774, and unmarried, and that Jane was of age in 1776, and that before her marriage with the Complainant, Short, she had been married to Alexander Nelson, who, together with the Complainants, Robert Thompson and wife, set up a claim to the land, about the year 1779.

The devisees of Archer, in their answer, say that their testator was a purchaser of the lands for a valuable consideration, without notice of Complainant's claim.

Some additional statements appear in the bill of revivor, which are, that Jane, the Defendant, not having been privily examined when she executed the deed to Archer, the title, upon her death, devolved upon her heirs, who are her issue by Thomas Blair. These issue, in their answer, rely upon the answer filed by Thomas Blair and wife, and require the Complainants to be put to the proof of the illegality of their mother's conveyance.

The Jury have found, that the conveyance from (591) Lord Granville to Jane M'Cuistion, was fraudulently obtained upon an entry to which the Complainants, Ruth and Jane, were entitled; and the questions before this Court are, 1st. Whether as the grant forms a part of Defendant's title, and shews upon the face of it, to have been made according to the certificate of survey annexed to it, such survey being in the names of the Complainants, Ruth and Jane, amounts to notice of their equitable title? 2d. Whether the Complainants are barred of relief by length of time?

As to the first question. Where land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser is entitled to all the deeds as incident to the land, to enable him to defend it. 1 Co. 1. The special warranty which Blair and his wife made to James Archer, entitled him to the possession of the grant; it formed part of his title, and it is to be presumed he received it. It is a well established rule in this Court, that where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact shewing an equitable title in another, he will be affected with notice of that fact. As where a person took a mortgage from one who claimed the land under a will, by which it was encumbered with legacies, the mortgagee could not deduce his title without the will, and therefore shall be chargeable with notice, although the devisee had levied a fine to the use of himself and his heirs. He shall be presumed to know it, although in fact he may be ignorant of it; for his ignorance must be the effect of gross negligence. Hence this kind of constructive notice is founded upon evidence of so satisfactory a kind, that it is held to be incontrovertible: so that if a man, upon the purchase of land, has a deed put into his hands, which recites a title in some other person, he will not be allowed to prove that he did not read the deed, or that he was ignorant of the recital. And even if a person purchase lands with notice that they are contracted to be sold to another, and (592) take the deed to his son and his heirs, though the son had no notice of the contract, yet the notice to the father shall affect him. 1 Ch. Ca. 38. 2 Vern. 662. 2 Anstruther 438.

The rule may be applied to many cases, in which it would probably produce much hardship; as where many deeds were to be examined in the investigation of a complicated title, a person might overlook or forget the fact, with the knowledge of which he is charged. But when James Archer purchased from Blair and his wife, the only title they had, was contained in the grant from Earl Granville, and it was impossible to inspect that without knowing or having reason to suspect, that it ought to have issued in the names of Ruth and Jane M'Cuistion. When to this is added, that Archer had an immediate right to the possession of the grant, no regret can be felt at the application of the rule to his case, since it so fully accords with its justice.

As to the second question. James Archer having, then, purchased the land with notice of this combination of trust and fraud, he and all volunteer claimants under him, must take the land, subject to the Equity, to which it was liable in the possession of Blair and wife; and if the lapse of time would bar the Complainants against them, it must do so against the Defendants. They claim under a purchase made by their ancestor fifty years ago, during part of which time, one of the Complainants was of full age and unmarried, and forty years have elapsed since she arrived at age: the other Complainant reached her full age nearly forty-five years ago, and has been twice married. About the year 1779, the Complainants, Ruth and Jane, with their husbands, set up a claim to the lands, and soon afterwards abandoned it, or remained silent about it. No reason is given in the bill, why they have slept so long upon their rights, nor is their acquiescence in the Defendants' possession for the rest of this long period, in any wise accounted for. In this view of the case, it would be entirely just that the Complainants should be denied relief, (593) unless they are protected by the rule that trust and fraud are not within the statute of limitations. The rule with respect to a trust is, that if it be constituted by the act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar: but if a party is to be constituted a trustee by the decree of a Court of Equity founded in fraud or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered. A fraudulent transaction, from the secrecy with which it is usually conducted, may remain for a long time unknown to the injured party; and it would be unconcientious to allow the Defendant to avail himself of the statute during such a period. But after the discovery of the fraud, a new right of action is given to the party affected by it, and there is no reason for requiring a suit to be prosecuted at law, and barring the Plaintiff if he neglect it, which does not equally apply to a Court of equity. In 3 Peere Wms. 143, it is said, "If the fraud was known and discovered above six years before exhibiting the bill, this, though a fraud, would be barred by the statute of limitations." In Weston *v.* Cartwrite (Select Cas. in ch..34), it was held, that notwithstanding a fraud, the Court, after a length of time, ought not to investigate the subject. It is said by a great Chancellor, that Courts of Equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for Law proceedings, Equity will, in analagous cases, consider the equitable rights as bound by the same limitations. 2 Schl. & Lef. 632. The hardships and injustice with which a contrary rule might operate against executors, administrators, legatees, and innocent persons claiming under a fraudulent party, is much considered in 2 Ves. jun. 92.

Upon this ground, therefore, the Complainants must fail, because the discovery of the fraud was made many years since, and, indeed, it was of a nature that could not (594) be concealed. It would be a most alarming precedent to investigate transactions after so great a lapse of time, when the fraud imputed was committed before the birth of those who are now called upon to answer it, and when no reason is shewn for the delay. The bill must be dismissed.

ROBERT H. JONES, administrator of AUGUSTINE BAYNERS, deceased, *v.* JOHN BRODIE, administrator, with the will annexed, of ALEXANDER BRODIE, dec'd.

From Warren.

Under the act of 1715, ch. 48, requiring "the creditors of any person deceased to made their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred," two circumstances must concur to put the bar in operation, to wit: the death of the debtor, and the simultaneous existence of a creditor.

If, therefore, the creditor die before the debtor, and no adminstration be taken out on his estate in the life time of the debtor, but is taken out afterwards, and suit is brought within due time, although it be more than seven years after the death of the debtor, the act of 1715 does not bar the claim.

When the statute of limitations begins to run, nothing will stop its operation; and, therefore, if a debtor die in the life-time of his creditor, whose cause of action has accrued, the act of 1715 will attach upon the claim of the creditor, although no administration be taken out on the debtor's estate for more than seven years.

In the report of the case of M'Clellan *v.* Hill's executor, in Conference Reports, 479, the fact of Hill's death before that of M'Clellan is omitted.

This was an action of debt, to which the Defendant, among other pleas, pleaded the act of 1715, ch. 48. To this plea the Plaintiff replied, "that Augustine Bayners, his intestate, died *before* the death of Alexander Brodie, the Defendant's testator, and that this suit was brought within less than seven years after letters of administration were granted on the estate of said Bayners." The Defendant rejoined, (595) "that more than seven years had elapsed from the granting of letters of administration, with the will annexed, on the estate of Alexander Brodie, before the bringing of this suit; that John Brodie, the administrator, had delivered over to one of the legatees and distributees, his legacy and distributive portion of the said Alexander Brodie's estate; that he, the said John, was entitled to a legacy and another distributive share of said estate, as legatee and one of the next of kin; and that the other legatees and distributees had commenced suit, which was then pending, against him the said John, for the residue of the estate, which suit was brought before the commencement of this suit by the Plaintiff." The case was sent to this Court, and

TAYLOR, Chief Justice, delivered the opinion of the Court: The only fact agreed by the pleadings, out of which the question of law now to be decided, arises, is that the Plaintiff's intestate died before the testator of the Defendant, and that within seven years after administration was granted to the Plaintiff, this suit was brought. The Defendant pleads in bar to the recovery, the act of 1715, ch. 48, the words of which are, "That creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred."

By the common act of limitations, the bar begins when the cause of action accrues; and if the creditor be then living, the statute continues to run, although he should afterwards die intestate, and no administration be taken out upon his effects until more than three years thereafter. In other words, the administrator will not, in such case, be allowed three years from the time administration is granted, but the bar will be computed from the cause of action commencing. On the other hand, if money belonging to an intestate's estate be received by the Defendant before administration is taken out to the creditor, the administrator will be (596) allowed three years from the time he administers; because, when the cause of action did accrue, there was no person who could bring suit.

These principles, after much uncertainty and confusion in the case, and particularly in abridging them for the elementary books, were at length ably expounded and finally settled, in Hickman *v.* Walker, and Smith *v.* Hill. Hickman *v.* Walker, Willes, 29; Smith *v.* Hill, 1 Wills, 134. By the very words of the act relied upon in this case, two circumstances must concur to put the bar in operation, to-wit, the death of the debtor and the simultaneous existence of a creditor. When creditors are required to make claim within seven years, the existence of creditors is presupposed at the moment from which the bar begins; and the construction is necessarily excluded, which shall take away the claims of those who shall become creditors after that period. To all statutes of limitation, the principle has been hitherto applied, that when they begin to run, nothing will stop their operation, 4 Term Rep., 300; Plowd., 355: and accordingly, if the intestate of the Plaintiff had been alive, when the Defendant's testator died, the act of 1715 would have attached upon his claim, although no administration had been taken out by the plaintiff, for more than seven years afterwards. That was the case of M'Clellan's executors *v.* Hill's executors, Conference Rep., 479, although this circumstance does not appear in the report. But I have examined the record, and ascertained the fact to be, that Hill died more than a year before M'Clelland. That case is, therefore, reconcilable with this; for the act began to run against M'Clellan, then "*a creditor at the time of the death of the debtor.*" In this case, there was no creditor when the Defendant's testator died, nor was any person authorized to make claim, until the Plaintiff administered; and he having made claim within the time limited by the act, is not affected by the bar. The opinion of the Court is, that the plea of the act of 1715, should be overruled.

(597)

WILLIAM BLACKLEDGE, Executor of the Last Will of BENJAMIN BLACKLEDGE, Deceased, *v.* THOMAS SINGLETON, *et al.*

From Craven.

Difference between ancient and modern decisions, as to legacies void either by reason of the *uncertainty* of the legatee, or of the *inability* of the legatee to take. Both are founded upon the supposed intention of the testator: but the ancient decisions say, the testator intended to pass only that which was left after taking out the legacies, and that the executor or next of kin take the lapsed legacies; and the modern say, that the testator intended his residuary legatees should take all that does not pass under the will, no matter from what cause there may be a residue. Neither of them, however, say that a legatee can take without, or contrary to, an intent. Therefore,

Where a testator bequeathed to his nieces, "the residue of his property not disposed of, except his negro woman Jenny," and in a codicil to his will, directed "that his negro woman Milly be left precisely as his negro woman Jenny was left in his will," and Milly had a child after the death of the testator, this child belongs to the next of kin, and not to the residuary legatees.

If an executor act with good faith in asking advice of the Court of Equity, the costs shall be paid out of the estate of his testator.

This was an application to the Court of Equity, by the Complainant, for directions how to distribute a certain portion of the estate of his testator. The bill charged that the testator had bequeathed certain negro slaves to his wife, and to Benjamin Blackledge Hanks "one-third of his negroes not otherwise disposed of;" and to Richard B. Singleton and Thomas Singleton, "the remaining two-thirds of his negroes not otherwise disposed of, except his negro woman Jenny, left him by his father;" and to his nieces, Polly Blackledge, Ann B. Hatch, and Martha Singleton, "the residue of his property not disposed of, except the negro woman Jenny, as before excepted."

And in a subsequent clause of the will, he "recommended his negro woman Jenny, as excepted in a former clause, to the particular care of his brother William (the Complainant,) and requested that he would not remove her from (598) the plantation where she lived, unless by her consent, and in case she should, by old age or infirmities, need support, that it be drawn from the hire of certain negroes," which he directed to be hired out for a particular time.

In a codicil to the will, the testator directed "that his negro woman Milly be left with, and precisely as his negro woman Jenny was left in his will."

After the death of the testator, the negro woman Milly had a child named Squire, and the Complainant prayed the advice of the Court, to whom this child belonged, and how and in what manner he should dispose of him. He charged that Squire was claimed by Benjamin B. Hanks, Richard B. Singleton and Thomas Singleton, under the bequest to them, "of the negroes of the testator not otherwise disposed of, except the negro woman Jenny:" and was also claimed by the nieces, Polly Blackledge, Anne B. Hatch and Martha Singleton, under the bequest "of all the residue of testator's property, not disposed of, except the negro woman Jenny." Complainant also charged that Squire was claimed by the next of kin generally, of the testator, as a residuum not disposed of by the will; and he submitted whether he himself was not entitled to Squire, as the increase of that which, by the will, was given to him. The case was sent to this Court, and

HENDERSON, Judge, delivered the opinion of the Court:

I think this short answer may be given to the claims of Benjaman Blackledge, Richard B. Singleton and Thomas Singleton, that Milly, the mother of Squire, being excepted from their bequests, they can have no claim to any of her issue born after the testator's death; and to the claim of William Blackledge, that the testator intended him no beneficiary interest in Milly; at most he is only a naked trustee. And as for his claim to Squire for the support of the two negro women, the testator has pointed out another (599) fund for that purpose. The only contest is between the residuary legatees and the next of kin.

To ascertain in whom the right to Squire is, it is necessary to fix the condition of his mother. *Partus sequitur vent-*

rem. William Blackledge's claim has already been disposed of: if he has any interest, it is as a mere trustee for the residuary legatees or the next of kin. In favor of the claim of the residuary legatees, it is said that they must take *all*, after satisfying the claims under the will, and that this claim extends to legacies lapsed by the death of the legatees before that of the testator. As to cases where a legacy is void by reason of the uncertainty of the legatee, or of the inability of the legatee to take, there is a difference between the ancient and modern decisions on some points; but it may be admitted that the modern are correct; for they are bottomed upon that universal principle in our law, that in the construction of wills, the intent is to be sought for, and, when not contradictory to law, is to be followed. The modern decisions say, that the testator intended his residuary legatees should take all that does not pass under his will, no matter from what cause there may be a residue: the ancient say that he only intended to pass what was left after taking out the legacies, and that the executors, or the next of kin, take the lapsed legacies: both making it a question of intention. But no case goes so far as to make a legatee take without, or contrary to, an intent.

In this case, Milly is expressly excepted out of the residuary clause, and, of course, cannot pass under it. Milly, therefore, not being disposed of to any one by the will, but if to any one, to a naked trustee, Squire, her issue, belongs to the next of kin.

As we believe that the executor acted with good faith, in asking the advice of the Court, his costs must be paid out of the proceeds of the sale of Squire.

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ABATEMENT.

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AMENDMENT OF RETURNS ON PROCESS BY SHERIFFS.

1. The sheriff may be permitted to make a return upon an execution, or to amend it according to the truth of the case, at any time after the return day, even when important consequences as to the rights of the parties, may be produced by such return or amendment. 128.
2. A. recovers a judgment at Law against B. and C, which is stayed by injunction. B. dies, and the suit in Equity is prosecuted by C, who also dies before the hearing, making his will, and bequeathing a negro girl slave to his daughter Elizabeth. A decree is made after his death, dissolving the injunction in part, and giving A. leave to proceed upon his judgment at Law. Neither the representatives of B. or C. are made parties to this decree. A. sues out his execution against the goods, chattels, lands and tenements of B and C., which execution the sheriff levies upon the negro girl slave, bequeathed to Elizabeth, and then in her possession by the assent of the executors: He sells her for £60, and pays the money into the office, he being ignorant of the bequest. Elizabeth sues the sheriff and recovers the value of the negro girl; and the sheriff thereupon moves the Court for leave to amend his return on the execution, so as to set forth the fact that there was no property of B. and C. to be found; and also for leave to withdraw from the office the money which he had paid in. The motion allowed; for upon the application of Elizabeth, the Court would have restored the property after the seizure: and as she elected to bring a suit against the sheriff, he should be considered as standing in her place, and having the rights which she had, before the action was brought. *Id.*

APPEALS.

1. A *scire facias* issued to shew cause why a forfeiture should not be made absolute. The defendent shewed cause, and the county court remitted the forfeiture. The solicitor for the state appealed to the superior court. In that court, the case must be

heard *de novo;* and the defendants shew cause in the same manner as in the county court. 230.

2. Appeal bond contained no covenant to perform the judgment, sentence or decree of the superior court, but merely a covenant to pay all such costs and charges as by Law is required in such case. No judgment can be rendered against the securities in such bond, it not being taken in the manner prescribed by the act of Assembly regulating appeals from the county to the superior court. 235.
3. Debt on a note sealed by one obligor, but not sealed by the other. The Defendants pleaded severally. The executors of one obligor pleaded the "General issue and fully administered:" the other obligor pleaded "the general issue and statute of limitations." The jury found the plea of "fully administered" in favor of the executors; and upon the plea of the "statute of limitations," they found against the other defendant, from which he appealed; and in the superior court it was moved to dismiss the appeal, because he alone had appealed, and there were other defendants. Motion to dismiss disallowed; for by the act of 1789, ch. 57, suits may be brought and prosecuted on all joint obligations and assumpsits, in the same manner as if they were joint and several. If an assumpsit be brought against two, the jury may find against one and in favor of the other; so that the judgment to be given against the parties in this action is not joint. The act of 1777, ch. 2, gives the right of appeal to any person, either plaintiff or defendant, dissatisfied with the sentence, judgment or decree of the county court. The rule in writs of error is, that all persons against whom a joint judgment is given must join in it; or if any of them refuse, he or they must be summoned and severed. There is an absurdity in requiring a party to join in prosecution of a writ of error, in whose favor the judgment below had been rendered; and summons and severance apply only where the judgment was given against a party who will not join. The like rule prevails with respect to appeals. As to the plea of the statute of limitations, the note was given and became due in 1810; suit was brought in 1816. The act of 1814, ch. 17, does not allow three years after its passage for bringing actions of debt upon simple contract, where the cause of action then existed: but limits the bringing of the action to three years "after the cause of action accrued." And here the cause of action having accrued in 1810, the action was barred the moment the act was passed. 306.

ARBITRAMENT AND AWARD.

1. Bill for the specific execution of a contract. A. and B, having at their joint expense; built a set of mills, A. agreed to convey to B. his moiety of the mills, upon B's paying him the sum which the mills cost him; and it was further agreed that four persons then named by the parties, should determine this sum. A. then declared, that he would no longer be responsible for any damage the mills might sustain, he being no longer the owner of any part of them; and B. proceeded and expended considerable sums in improving the mills. The arbitrators met, and were unable to agree in opinion, as to the sum which the mills cost A, who refused to have an umpire chosen. The bill prayed that A. might be decreed to render an account of what the mills cost him, that he might be decreed to receive that sum, and execute a conveyance to B. The bill dismissed; because it seeks

to enforce an agreement which the parties did not enter into; their agreement being, that B. should pay to A. the sum which *the arbitrators should determine*, and not the sum which A. should state in account, or that the Master should find upon taking an account. Where a reference is made to several persons, the concurrence of all is necessary, unless it be expressly agreed in the submission, that a less number may make the award; and, as either party may revoke the authority given to arbitrators in common cases, before an award, so either party may refuse to have an umpire chosen, where the arbitrators disagree. Here the arbitrators were to settle the price of the purchase; this price is an essential part of the contract; the Court cannot substitute itself for the arbitrators, where a substantial thing is to be done by them. They will not even divide an estate, where the parties have selected particular persons to do it; for it is a personal confidence, which cannot be reposed in others against the will of its authors. 189.

ASSUMPSIT.

1. Money betted on a horse race is deposited with a stake-holder to be delivered by him to the winner of the race. The stake-holder pays over the money, after notice from the loser of the race not do so so. The loser is entitled to recover the money from the stake-holder; for the act of 1810, ch. 14, declares, "that every promise, agreement, note, bill, bond or other contract, to pay, deliver, or secure money or other thing, won or obtained by wagering or betting on a horse race, or to pay or secure money or other thing, lent or advanced for that purpose, shall be void." In all cases of this sort, the enquiry is, who has the money? Is it in the hands of a party to the illegal transaction? Or is it in the hands of a person not a party? If in the hands of a party, it cannot be recovered, provided it were paid to him by the consent of the other party; because both parties are equally criminal, and there can be no reason why he who parted with his money voluntarily, shall have it back. To his case both maxims apply, "*in pari delicto melior est conditio possidentis*," and "*Volenti non fit injuria*." But if the money be in the hands of the stake holder, or he has paid it over after notice not to do it, the person who made the deposit, shall recover it back; for as in the first case, the party who has voluntarily paid over the money, cannot rest his claim to recover it upon a moral foundation, so in this, the stake holder cannot rest his claim to retain it upon a moral foundation. Between him and the party making the deposit, there is no moral turpitude, and while the money remains in his hands, it belongs to the party that lodged it there. 172.
2. In an illegal transaction, money may always be stopped whilst *in transitu* to the party entitled under such illegal transaction. *Id.*
3. In a conversation between A. and B relative to the purchase of a pair of horses, the price was agreed on; but A. said he could not spare the horses, until they had made another trip in the stage. B. agreed to deposit the money with C, and when the horses had made another trip in the stage, and A. ascertained that B. had deposited the purchase money with C, he was to deliver the horses to the stage-driver for B. Before the trip was completed, the horses ran away with the stage, and one of them got much injured. A. tendered the horses and demanded the purchase money deposited with C. He is not entitled to the

money, because the right to the horses was not changed, the contract of sale not being complete. 312.

See PARTNERS.

4. A. and B. made a wager on a horse race in 1816. The money was deposited with a stake-holder, and after the race was run, A. demanded of the stake-holder his deposit. The stake-holder refused to return the deposit, and A. brought an action for money had and received. He is entitled to recover; for the act of 1810, ch. 14, prohibits the creation of any right on the event of a horse race, and leaves the parties, as to any remedy, precisely where they were, if no such agreement had been made. As long as the money remains in the hands of the stake-holder, it belongs to him who has the *legal right;* and the legal right, which was in the person depositing, when the deposit was made, cannot be divested out of him and placed in another by the event of an illegal wager. Whilst the money is *in transitu*, before it comes to the actual possession of the winner, by the direction of the loser to pay it over, after the event, or by his omitting to forbid the payment, when he might, if he thought proper, it is subject to be reclaimed by the person who made the deposit. 458.

ATTACHMENTS.

1. A garnishee summoned upon an attachment, stated that the debtor had executed to him certain deeds of trust for real and personal property, to secure three of his creditors, which property was sold at public sale, upon a credit, the purchaser giving notes negotiable at the State Bank; that the sums secured by the deeds of trust had been discharged by a like amount out of the proceeds of the sale, leaving a surplus of $1,208, for which A. B. had given two notes payable to C. D. who had indorsed them in blank. A. B. was also summoned as a garnishee, and declared his willingness to pay the money on the notes. The plaintiffs in attachment are entitled to have judgment of condemnation of this money; for, if the garnishee had received the surplus money, the purposes of the trust deeds being satisfied, it would have been money received to the use of the debtor, and might have been recovered in *indebitatus assumpsit.* The law is the same, whether the surplus be in money or in notes, and upon a refusal to deliver the latter, the debtor would be entitled to an action of trover. The attachment law makes notes not yet due, whether given for money or specific articles, subject to that process. And it is no objection that the notes are given for the purchase of property in which the debtor had only an equitable interest. Whether the property be liable to execution, is not the criterion to determine whether it be attachable, otherwise the attachment law could not operate upon bonds and simple contract debts. As soon as the purposes of the trust deeds were satisfied, there was but one equity remaining, and that was in the debtor, whose right to the money, had it been received, could have been enforced at law. 256.

BASTARDY.

1. A man charged as putative father of a bastard child, is at liberty to shew that the mother of the child is of mixed blood, and within the fourth degree, and therefore excluded by the act of Assembly from swearing against him. 121.
2. The county court cannot charge a man with the maintenance of a bastard, when it appears to them, that the magistrates who

took the examination of the woman, have proceeded against law, in the judgment they have found. *Id.*
See JURISDICTION.

BILLS OF REVIEW.

1. Rules concerning Bills of Review.—It is provided by the third of Lord Bacon's Ordinances, that no Bill of Review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as if it be for land, that the possession be yielded: if for money, that the money be paid; if for evidences, that they be brought in: and so in other cases, which stand upon the strength of the decree alone. His fourth Ordinance provides, that if any act be decreed to be done, which extinguishes the party's right at the Common Law, as making an assurance or release, acknowledging satisfaction, cancelling bonds or evidences, and the like; those parts of the decree are to be spared, until the Bill of Review be determined; but such sparing is to be warranted by public order made in court. 159.
2. Peculiar circumstances have induced the court to make exceptions to the rigid enforcement of the third Ordinance: as 1. Where the party would swear that he was unable to perform the decree, and would submit to lie in prison until the matter was determined on the Bill of Review.—2. Where the party had been in prison for twenty years, and swore that he was not worth forty pounds sterling, besides the matter in question, he was allowed to bring a Bill of Review, without paying the costs decreed in the original case.—3. Where a large sum of money was decreed to be paid, the court permitted the party to bring a Bill of Review, on giving bond with good security to perform the decree. *Id.*
3. In North Carolina, a party has been allowed to bring a Bill of Review, upon its being shewn to the Court, that he was insolvent. The Courts in this state will adopt the mild rule, where the party is able to perform the decree, of permitting him to bring a Bill of Review, upon his making secure the party who obtained the decree. This rule best comports with the condition of our country, and our mode of doing business in Courts of Equity. *Id.*

BOUNDARY.

1. The rules which have been established by the decisions of the Courts, for settling questions relative to the boundary of lands, have grown out of the peculiar situation and circumstances of the country, and have been moulded to meet the exigencies of men, and the demands of justice. These rules are,—1. That whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for, it may be; or however short, or beyond the distance specified. 2. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. 3. When the lines or courses of an adjoining tract are called for in the deed or patent, the lines shall be extended to them, without regard to distance: Provided, those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary. 4. Where there are no natural boundaries called for, no marked trees

or corners to be found, nor the places where they once stood, ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for; in all such cases, we are of necessity, confined to the courses and distances described in the patent or deed: for however fallacious such guides may be, there are none other left for the location. 84 to 95.

2. Boundary is a question of fact, or at least of law and fact combined, and to be decided by the jury and not by the court. It is the province of the *particular* description to abridge and limit, but not to enlarge the *general* description. Where the thing referred to has no *particular name*, and there are superadded to the general description, specifications or localities, *all* these specifications or localities must concur to point out the object, otherwise it does not appear to be the thing intended. If one grant to J. S. one thousand acres of land, and *no more*, according to certain lines which include two thousand acres, the two thousand acres pass, because the buts and bounds are more certain than the quantity. Quantity is no way material, except where the boundaries are doubtful; and there it is a mere circumstance. 539.

3. Questions of boundary, like all other questions of fact, depend on their own particular circumstances, where every shade of evidence, and every the most minute circumstance produces its effect. The artificial rules respecting boundary are intended only as guides in the application of circumstances, and not as fixed laws, to be applied indiscriminately to all cases. The injustice complained of in our boundary decisions, has been produced by considering these artificial rules, not as mere guides, but as fixed laws, and applying them indiscriminately to all cases, whether they fit them or not. It is the province of the Court to expound to the Jury the law connected with the facts under discussion, but not to express an opinion on the facts. If, therefore, the Court express an opinion on the facts, a new trial will be awarded; for 551

The act of 1796, ch. 4, declares, "that it shall not be lawful for any Judge in delivering a charge to the jury, to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." 556.

CHARGES UPON PROPERTY, BY DEED OR BILL.

1. A father, for the purpose of advancing his son in life, conveys to him his manor plantation and sundry slaves, reserving to himself and wife, the use of such lands and slaves during their joint lives and the life of the survivor of them: and in the conveyance, "it is agreed between the father and son, and is to be taken as a principal part of their contract, that the son is to provide for, maintain, keep, succour and nourish the father's daughter Mary, during her natural life, so that she do not suffer or lack for necessaries in any manner whatsoever." The support and maintenance of Mary, is not a charge *upon the property* conveyed to the son, but a personal charge upon the son. 99.

2. A covenant before marriage to settle certain lands upon the wife, amounts to a specific lien upon those lands in the possession of the devisee; but a general covenant to settle lands upon the wife, of a certain annual value, gives no remedy to the wife, but as a specialty creditor. 100.

COLOUR OF TITLE.

See LIMITATIONS.

COMMON CARRIER.

No custom among the owners and freighters of boats on a navigable river, will excuse them from the operation of the law governing common carriers. 149.

CONSIDERATION.

See Equity.

CONSTABLES.

1. A constable being appointed for "the district of Newbern," in Craven county, gave bond "well and truly to discharge his duty as constable in the said district." In an action on this bond for neglect to collect money on an execution which was put into his hands, proof that the defendant in the execution had property in Craven county, but out of the district of Newbern, will not support the action. 146.
2. The powers and duties of constables are coextensive with the limits of the county within which they are appointed. The word "district," used in the 7th section of the act of 1741, ch. 5, does not restrict their powers or duties to any section of the county; it is merely directory to the county court to make an appointment where a vacancy happens. *Id.*
3. Although, for this reason, the constable in the case above, is liable in an action on the case for breach of duty anywhere in the county of Craven; yet, being sued on his bond, the covenant in which is, "that he will discharge his duty in the district of Newbern," if the breach assigned were, that he did not discharge his duty *generally*, there would be a variance between the bond and the breach; if, that he did not discharge his duty within the district of Newbern, the evidence does not support the breach. *Id.*

CONTRIBUTION BETWEEN DEVISEES AND LEGATEES.

1. Testator devised his lands to Fleming, an alien, and three negro slaves to his brother Thomas. He appointed Fleming and Harwell his executors, and gave them power to sell such of his property as they might think necessary for the payment of his debts. The executors sold the lands, and applied the purchase money to the payment of Fleming's debts. The negro slaves bequeathed to testator's brother Thomas, were then sold to pay the testator's debts. They were sold upon a credit, and purchased by the guardian of Thomas, in trust for him. The guardian gave his own bond for the purchase money. Thomas, the legatee, filed his bill against Harwell, the surviving executor, (Fleming having died) charged him with a misapplication of the purchase money of the lands, that the lands were sold avowedly to pay the debts of the testator, and if the money had been applied to this object, it would not have been necessary to sell the negroes. The bill prayed as against Harwell, that he be decreed to deliver up the bond which he had taken for the purchase money of the negroes. The bill was also filed against Johnson, the purchaser of the lands, charging him with notice of the trusts of the will, and with connivance in the misapplication of the purchase money; and prayed, as against him, that if complainant could not be otherwise relieved, he, Johnson, might be decreed to pay to complainant the value of the negroes. To this bill, the defendants demurred, and shewed for cause, that it appeared by complainant's own shewing, that he was not interested in the question made in the bill relative to the sale of the lands, or the

proceeds of the sale, nor entitled to have the bond delivered up. The demurrer allowed, for the personal estate is primarily liable to pay debts: and although the testator might have subjected *any particular part of his estate* to this purpose, yet, in this case, he has not done so; he has given power to his executors to sell any part of the estate they pleased, to pay debts. This does not transfer to the real estate the liability of the personal to pay them; and after the death of the debtor, the law directs the personal estate to be exhausted, before the lands shall be resorted to for satisfying debts. The rule therefore does not apply in this case, "that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien." In the lifetime of the testator, creditors might sue out their executions against his real as well as personal estate; but after his death, the lands go to the heir or devisee, and the personal estate to the executor; and the creditors cannot pursue the first until the latter be exhausted, in satisfying their simple contract debts; and the bill does not charge that complainant's legacy was sold to pay specialty debts. The court must therefore presume that it was sold to pay simple contract debts only. Heirs and devisees cannot be sued in the first instance for such debts, and the lands descended or devised to them cannot be subjected to their payment, except in the way pointed out in the act of 1784, ch. 11. If then, the lands devised in this case, had been sold, and simple contract debts paid with the proceeds, the devisee would have a right to call upon the legatee of the personal estate to make his devise good to him. But if the debts were specialty debts, complainant could not stand in the place of the specialty creditors, as against the devisee of the lands, because such a devisee is as much a *specific* devisee, as the specific devisee of a chattel. The principal rule in marshalling assets is, that when a creditor may resort to both the real and personal estate, and the legatee can only resort to the personal, if this be insufficient to pay both, the creditor will be confined to the real estate: or if he has been satisfied out of the personal fund, the court will permit the legatee to stand in his place, and receive satisfaction out of the real estate, to the amount taken from the personal. But this rule operates, only where the real estate is charged with the payment of debts or legacies, or where the creditor has a lien upon it; except where the donee is heir at law, and then against him the lands will be liable to the specialty debts in case of the personal estate. Fleming must be considered a devisee of the land; for an alien can *take; for whose benefit* he takes, is a question in which complainant has no interest. 192.

CREDITORS.

See LIMITATIONS—Statute of. 13.

COVENANT.

1. Tenant in tail aliens, and in his conveyance, "he, for himself, his heirs, executors, and administrators, doth covenant and agree, the premises, to him the said A. B. his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever to warrant, secure and defend." He then dies, and real assets descend to the issue in tail, of greater value than the land aliened. A discontinuance of the estate tail is not worked: for the covenant is not a covenant real, annexed to the land, whereby the alienor and his heirs are bound either on a

voucher or judgment in a *warrantia chartæ* to yield other lands of equal value in case of eviction of the tenant by better title. But it is a personal covenant to defend the possession, a covenant for quiet enjoyment, the breach of which is to be repaired not in land, but in damages; and these must be primarily paid out of the personal fund. 47.

2. The disuse of real actions has, from necessity, given to the warrantee a right to bring an action of covenant, in which he recovers damages according to the value of the land at the time the warranty was entered into. If he could not bring this action, he would be without remedy; but the same remedy does not exist for rebutting the heir: for if the ancestor hath left real or personal assets, the purchaser may be recompensed, *Id.*
3. Action of covenant on a deed, in which the defendant set forth "that in consideration of £44, to him paid, he had sold to the plaintiff a note of hand upon John Arnold for £50, given to him by one John Maschan; *and if there should any thing fail in the recovery of the said note*, or if Arnold should pay it in paper money, without allowing the depreciation, then, and in that case, the defendant obliged himself to make the same good to the plaintiff: or if Arnold should be allowed a receipt by one Dix to him for £18, the defendant obliged himself to make it good." This covenant extends to the solvency of Arnold, and the object of it was to secure the plaintiff against his insolvency, the allowance of the depreciation and the receipt of Dix. The words "if any thing should fail in the recovery of the said note" point to a complete indemnity to the plaintiff, if from any cause he should not receive the amount of the note; they mean not only that a judgment should be obtained, but that the money should be paid. A "recovery" signifies, in legal contemplation, the obtaining of any thing by judgment or trial at law. 169.

See DAMAGES. 2.

CONSTRUCTION.

1. The true meaning of the maxim, "*Proximo antecedenti fiat relatio nisi impediatur sententia*" is, that reference shall be made to the next antecedent or not, accordingly as the sense, and reason and justice of the thing require it. 18.
2. In construing a will, the Court will look to the state of the testator's family, and to the kind and extent of property he owned at the time of making his will. 27.

DAMAGES.

1. A. agrees to deliver to B. certain specific articles by a particular day, for which B. agrees to pay him a certain price. A. neglects to deliver them, for which he is sued. Although upon the trial it do not appear that B. has sustained any actual damage, he is entitled to recover nominal damages; for the Law requires damages to be assessed for the breach of all valid contracts, when proved to the satisfaction of a jury. 119.
2. A. having covenanted to build for B. a house of certain dimensions and form, of good materials, and to execute the work in a workmanlike manner, built a house of the form and dimensions set forth in the covenant; but part of the materials were not good, and part of the work was not done in a workmanlike manner. B. refused to accept the house, and sued A. on his covenant. B. is entitled to recover, not the value of such a house as A. had covenanted to build, but the difference in value

between such a house and the house built, and damages for the breach of the covenant: unless the materials and workmanship be so inferior as to be of little or no value. 501.

See Writs of Enquiry.—Eviction.

DEVISE.

1. A. by his will directed certain negro slaves to be divided between his three children, William, Mary and Sarah, when either of them should come of age, or sooner, if the executors found it necessary: and then declared, "that if either of the said children should die under age, without heirs, then that share should be divided between the other two children." Mary died under age and without issue: William then died, leaving Sarah, of the whole blood, and two brothers and a sister of the half blood, of the maternal side. The part of Mary's share which accrued to William upon her death, does not survive to Sarah, but goes to her and to the brothers and sisters of the half blood. 21.

See Legacies.

2. A. being seised of a tract of land, and possessed of five slaves, made his will, and therein lent to his wife, during her life, his land and three of his slaves, with his household furniture and stock. He then directed that if his wife should be *ensient* with child, such child should be raised and educated by his wife, out of the income of the property left her, *as well as all the property he died possessed of.* He then bequeathed to his brother's two daughters his other two slaves, to be divided between them when either of them should marry. The wife was *ensient* with child, and one of the brother's daughters having married, the executor was called upon to divide the two slaves and their increase between her and her sister. *Held*, that the brother's daughters were not to take, if the wife should prove *ensient* with child: and that all of the property belonged to the child after the mother's death. 27.

See Construction, 2.

3. Testator bequeathed negro slaves to his wife during her life, and directs that after her death they shall be set free; and enjoins it as a duty upon his executors to use their best endeavors to procure from Court a license to emancipate them. He then gives several small legacies to his nieces, and concludes his will with a declaration "that no person or persons whatever, being in any degree related to him or his wife, or any other person or persons whatever, other than was therein before mentioned, should ever, under any pretence, come in for a share, or receive any part of his estate." He appoints his wife and four other persons his executors; his wife holds the negroes during her life, and bequeaths them to her niece, whose husband takes them into possession, claiming the absolute property in them. The surviving executors bring detinue for the negroes, and recover; because although by the policy of our law, the ulterior limitation after the wife's life estate is void, the entire interest in the negroes did not vest in her: She could not claim, *under* the will, and in *express opposition* to the will; and here there were express words of exclusion as to any other interest than one for life. Her interest as one of those among whom the residue of the estate undisposed of by the will was to be divided, was not such an interest, before the assent of the executors, as vested a legal title in her legatee. The assent of the executors, was in this as in all other cases, co-extensive with the legacy. Where there is no remainder, the assent enures to the benefit of the

particular tenant only; and the executors are entitled to the possession of the chattel again, to perform the other trusts of their office. The clause of the will excluding all persons from a beneficial interest in the negroes after the life estate of the wife, does not affect the interest of the plaintiffs as executors or trustees, nor the interest arising from their office of executors, which is necessary to perform the trusts of the will, or the trusts raised by law. A legacy cannot be claimed *under* a will in express opposition to the plain intention of the testator. But the next of kin can take in express opposition to the words of the will; for they take under the Law, and not under the will. 110.

4. A. devised his lands to his son Henry, his daughter Peggy, and the child his wife was ensient with, as tenants in common; and declared that on the coming of age of his son Henry, it should be at his option to have the land sold or not; if sold, the money arising therefrom was to be equally divided between him and the other two children; and the executor was authorized to sell the lands, if Henry should wish it, and divide the money. A. died in 1793, and his wife soon afterwards was delivered of a daughter, who shortly thereafter died. The widow married, and had issue, a daughter named Attillia. Peggy died in May, 1796, and Attillia was born in September following. Henry, on arriving at age in 1807, sold the land, and Attillia now claimed one-fourth part of the lands, and brought an ejectment against Henry's alienee. Pending the suit, the executor executed a conveyance to Henry's alienee. Attillia is not entitled to recover any part *of the lands*, whatever right she may have to a share of the money for which they were sold; nor can the Court in the action of ejectment take any notice of her claim for a share of the rents which accrued before the sale. 156.
5. Testator lent to his son Littleton, three negroes, and directed his executors to hire them out and apply the hire to the support of Littleton during his life, and after his death, to divide the negroes and their increase, among his son Bird's children, as they should arrive at age. He then directed, that all the remainder of his estate should be sold by his executors, and after paying debts, &c. be equally divided among his son Bird's children, *as aforesaid*. Bird had several children born after the death of the testator, in the lifetime of Littleton, and before Bird's eldest child arrived at age. And a question arose, whether these after-born children were entitled to distributive shares of the property included in the residuary clause of the will. *Held*, that they were entitled equally with the children born before the testator's death. All the children of Bird are entitled, who were living at the time the property ought to be divided: that time is, "after Littleton's death, and when Bird's eldest child arrives at age." Both events must happen before a division; and the Court will postpone a division, until the happening of the latest event, in order to embrace a greater number of children, in conformity with the principles governing the Courts in marriage settlements. 178.
6. Where a fund is to be divided under a will, persons claiming the fund under a general description, are entitled, if they can bring themselves within the description. *Id.*
7. Where property is given to the children of A. and no time is fixed for a division, it is divisible, by the will, at the testator's death, although the executors must, by law, hold it for two years, for

the benefit of creditors: and only children born at the time of the testator's death, or in *ventre sa mere*, are entitled. *Id.*

See CONTRIBUTION.

8. Testator gave to his wife "all the property he received with her: and the rest of his estate he gave her until his son should come to lawful age, when the same should belong to him; and in the mean time, directed that his son be maintained and educated at a reasonable expense out of his estate, in proportion to the value of all the property, and its general profits and income." The widow died, leaving her son surviving her, who died before he attained the age of twenty-one. The legacy to the son vested in him on the death of the testator, and did not lapse by his death before twenty-one. The words "till his son should come to lawful age, when the property should belong to him," do not import a contingency: they only mark the time when the remainder limited in the will is to vest in possession; the devise being considered as made subject to the intermediate estate created out of it, and made an exception to it. This does not conflict with the rule, that where a devise or bequest is made to a person *when* he shall attain twenty-one, without any disposition of the property in the mean time, that generally such devise or bequest is conditional, and will not vest before that period; for the word "when" standing by itself and applied to legacies, is a word of condition; but an exception is made to the rule, where the testator has disposed of the intermediate interest either to a stranger or the legatee. 318.

9. Testator bequeathed a slave named Nell "to his wife during her natural life or widowhood," and in a subsequent clause of his will, he declared "that the negro woman Nell shall become the property of his daughters, A. and B, at their mother's death, *or* at the time his son Thomas arrived to sixteen years of age; and if the widowhood of his wife should terminate before her natural life, Nell should remain in the place where he lived for the support of his children." The daughters are not entitled to Nell, until both events happen, to-wit, the death of the widow, and the arrival of Thomas to the age of sixteen: and the Court will construe the word *or* conjunctively, to effectuate the testator's intention. 548.

10. Although the validity of an executory devise is to be tested, not by the event, but by the words which tie up the happening of the event, so that if the event happen at all, it must be within the prescribed time; yet, to claim under such devise, it must be shewn that the contingency has happened within the period prescribed, or as the testator directed. Therefore, where a testator directed, that upon the failure of the issue of his two sons, part of the lands devised to them should be rented out for the benefit of his daughter during life, and after her death to her children, and another part of the lands at the same time to pass to J. S.: If the limitation to J. S. be deemed good, yet he cannot recover the lands, without shewing that the issue of the sons had failed in the life time of the daughter. 558.

DESCENT.

1. S. having two daughters, A. and B. and a son C. made his will, and devised his lands to his grandson D. the son of C. The daughters A. and B. survived their father; the son C. died before him, whereby the grandson D. who was the devisee of the lands, became one of the heirs at law of his grandfather. A. one of the daughters, died intestate, and without issue. The mother of

D. married a second husband, by whom she had three children: and D. having died, a question arose, whether these children being of the half-blood of the maternal line, were entitled to share in the lands devised to D. he having left at his death, his sister B. of the whole blood, him surviving. *Held*, that they were entitled under the acts regulating descents; for D. took the land *under the will*, and not by descent. If he had taken by descent, the sister of the whole blood would exclude brothers and sisters of the half-blood. If a man devise his lands to his heirs without changing the tenure or quality of the estate, the heirs are in by descent: And so in all cases where they take the same estate by will, as they would have taken, had their ancestor died intestate. Where testator devises to his two daughters and their heirs forever, to be equally divided between them, the daughters take by descent and the devise is void: because the words of the devise make them tenants in common, which they would be under the act regulating descents, had their ancestor died intestate. The design of the act, in directing that the heirs shall take as tenants in common, was to exclude survivorship: for besides the unity of possession, they are assimilated to parceners by the unities of title and interest, all coming in by descent from the same ancestor, and claiming the same interest. In the case of parceners, a devise to one is good; as, where a man having two daughters, devises all to one, she shall take *all by the devise*, and not a moiety by descent, and a moiety by the devise; for this is not a devise to an heir, because both parceners make the heir, and the one is not heir without the other. Here the grandson, the devisee, was not the sole heir of his grandfather, the testator. There were two daughters, his aunts. He must, therefore, be considered as taking all the lands by purchase, and upon his death, the half-blood are entitled to inherit equally with the whole blood. 209.

2. Claim of the half-blood in the case of a *purchased estate*. Samuel Swann, sen. devised the lands in tail to his first son, Samuel Swann, jun. and to his second and third sons in succession, to-wit, John and Thomas, who were by a second wife. Samuel, the devisee, became seised in fee, by virtue of the act of 1784, ch. 22. He devised one part of the lands to John Swann, one of his brothers of the maternal half-blood, and another part to Thomas Swann, another brother of the maternal half-blood. John died intestate, leaving issue, Samuel Johnston Swann, who died intestate and without issue. Thomas Swann died intestate and without issue, leaving Mary, the maternal sister of the half-blood, and the said Samuel Johnston Swann, a nephew of the whole blood. A question arose who were entitled to the lands? The kindred on the paternal side, who were further in degree, or the maternal half-sister? The kindred on the paternal side are the lessors of the plaintiff: The maternal half-sister is the defendant's wife. *Held*, that the maternal half-sister is entitled to the lands: for 1, Both John Swann and Thomas Swann took the lands as purchasers: and the same person who would have been the heir of John Swann, had he died without issue, is the heir of Samuel Johnston Swann. At the common law, the principle on which the law of collateral inheritances depends, is, that upon the failure of the issue in the last proprietor, the estate shall descend to the blood of the first purchaser: and he who would have been heir to the father of the deceased, shall be heir to the son. When a man *purchased* an estate, he took it as a *feudum novum*, descendible to his heirs general, first of the *paternal*, and then

of the *maternal* line. If he died without issue, or brother or sister, or the issue of such, his eldest paternal uncle would take: If there were no such uncle, nor the issue of such, then his paternal aunts. If there were neither, nor the issue of such, then his eldest great uncle of the line of his paternal grandfather, and so on, until that line were exhausted, always giving a preference to the male stocks. On the failure of blood in the line of the paternal grandfather, then the same rule was to be followed as to the maternal grandmother's line. If that failed, then the maternal grandmother's line was to inherit. On the failure of that line, then the maternal grandmother's line was to be sought for. The issue of the eldest son of William Swann, who was the brother of Samuel Swann the elder, would be the heir of Samuel Johnston Swann, at common law. 2. But the act of 1784, ch. 22, has let the half-blood into the inheritance, *when that half-blood is in the line of inheritance.*—That act does not change or alter the *stocks or genealogical lines*, as they were known at common law. They remain the same, with the addition of the *half-blood* when *in those lines*. Mary, the wife of William Shepperd, is the heir entitled to these lands under the act of 1784; because she is next in the degree of the blood of the purchasers, being a sister; and although of the *half-blood*, the 3d and 4th sections of that act render her capable of inheriting. The half-blood shall not inherit when out of the common law stocks or lines, although in equal or in a nearer degree. Thus, when lands descend on the side of the father to a son who dies without issue, leaving a half-blood brother on the maternal side, and an uncle or more remote relation of the whole or half-blood on the paternal side, the relation next in degree on the paternal side, shall inherit: 1st, because he is of the blood of the first purchaser: 2d, the proviso to the 3d section of the act of 1784, declares that the *maternal* half-blood brother shall not inherit, *until such paternal line be exhausted of the half blood*, and of course, of the *whole* blood. Heirs shall be sought for in the paternal line, *ad infinitum*, before any of the *maternal* kindred shall inherit, however near in degree; and *e converso*, where the lands shall descend on the maternal line. 353.

3. Claim of the half-blood in the case of a *descended* estate, prior to the act of 1808, ch. 4. Henry Hill being seised of the equitable estate in the lands, died intestate, leaving an only child, Joseph John Hill, upon whom the lands descended. His mother, the widow of Henry Hill, married a second husband, by whom she had issue, who were living when Joseph John Hill, their half brother, died intestate. Henry Hill left a brother named Whitmel Hill, who afterwards died, leaving an only son, Thomas B. Hill, his heir at law. Upon the death of Joseph John Hill, in 1808, a question arose whether the lands of which he died seised, descended to Thomas B. Hill, his paternal cousin, and of the blood of the first purchaser, or to the maternal brothers and sisters of the said Joseph John Hill. The Complainants are the maternal brothers and sisters. The defendant is the paternal cousin and the heir at common law. Although this be a case of lands which come to the person last seised, *by descent*, yet the case having occurred prior to the act of 1808, ch. 4, the half-blood of the maternal line are entitled to the lands, under the act of 1784, ch. 22. 410.

DIVORCE.

1. Petition for divorce from the bonds of matrimony, for adultery committed in the years 1812 and 1813. Petition dismissed; for the act of 1814, ch. 5, is the only law which gives authority to the Courts to take cognizance of the subject of divorce. The adultery charged was prior to the passage of this act; and the act shall not be so construed as to have a retrospective operation. Because, before the passing of the act of 1814, adultery was punishable only by a fine. To superadd to this liability, a deprivation of the marital rights under the act of 1814, would be to *increase* the punishment of the offence; and this would be contrary to the 24th section of the Bill of Rights, which declares, that "no *ex post facto* laws ought to be made." *Ex post facto* laws are of different kinds: 1. Every law which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. The enhancement of a crime or penalty seems to come within the same mischief as the creation of a crime or penalty. To every petition for divorce, there must be an affidavit appended, that the facts charged have existed and been known to the petitioner six months before the filing of the petition. 327.

DISCONTINUANCE OF AN ESTATE TAIL.

See COVENANT.

EQUITY.

1. A consideration is necessary to raise an equity, but not to transfer it: when an equity is once raised, it is transferable like other rights, *at the will of the owner*.
2. A. being in possession of B's slave, a *fi. fa.* is levied on the slave, and C. agrees, at the request of A. to bid off the slave and advance the money on the *fi fa.* and to allow A. time to return the money and redeem the slave. To a bill filed to redeem, it is not necessary to make B. a party; for it is a contract of agency, and as between A. and C, A. is to be considered the owner of the slave, and C. is concluded from contesting his title. 80.
3. He who bargains with another, placing confidence in him, is bound to shew that a reasonable use has been made of that confidence. 79.
4. He who acquires a legal title by breach of trust, and by taking advantage of another's necessities, which he was instrumental in producing, shall not set up the title against him from whom he obtained it. *Id.*

See BILLS OF REVIEW.

See TENDER.—ARBITRAMENT AND AWARD.

5. A man dies seised of lands situate in two counties. The lands in in one county are partitioned among the heirs at law, by commissioners appointed by the county court, agreeably to the provisions of the act of 1787, ch. 17. This partition does not pre-

clude the Court of Equity from decreeing a sale of the lands situate in the other county, if it appear to the Court, that partition cannot be made of the lands without injury to the parties interested. 207.

6. A. being in want of money, borrowed $200 from B, and to secure the repayment thereof, placed in the hands of B, a negro slave, upon a parol agreement, that upon the repayment of the money, the negro should be re-delivered. B. sold the negro to C, who took possession and held for nine years. A filed his bill against B. and C. to redeem the negro. C. pleaded that he was a purchaser for a valuable consideration without notice; and in his answer relied upon the length of time he had had the negro in his possession. His plea being found by the jury to be true, the bill was dismissed as to C; for, 1. His plea shall avail him. 2. His long adverse possession shall also avail him. Equity will not take from him any defence or protection, which would avail him at Law. Here, his adverse possession for more than three years, is a good defence at Law, under the plea of the statute of limitations. And it is no answer to this objection, that the defendant has not pleaded the statute. It is only in those cases where Courts of Equity and Courts of Law exercise *concurrent* jurisdiction, that in this Court, the statute can be relied on as a positive bar; for Equity follows the Law, and the right of the parties shall be the same in both Courts. Where this Court has *exclusive* jurisdiction, Equity will *respect time*, and frequently decides in analogy to the statute of limitations. In this case, the defendant has exposed his situation, and the Court perceives that he has a good defence at Law, which he may use with a safe conscience, and will not therefore interfere. 273.

7. Husband and wife, being seised of a tract of land in right of the wife, agreed to convey the same in fee simple to a purchaser, for a fair consideration; and in pursuance of this agreement, they conveyed by deed, the tract of land to the purchaser, who executed his bonds for the purchase money. The husband died, and the wife not having been privily examined touching the execution of the deed by her during the coverture, availed herself thereof, entered on the land, expelled the tenant who held under the purchaser, and avoided the estate. The purchaser died, and his administrator filed a bill praying to have the payment of the purchase money enjoined. Demurrer to the bill overruled; for the purchaser contracted for the wife's estate of inheritance, not for the husband's freehold in her right. He obtained a conveyance, which transferred only the husband's estate. To make it good to pass the wife's estate, her private examination was necessary. The nature of the contract, and the transfer in its incipient state, shews that the agreement of the parties was, that a conveyance, effectual to pass the property agreed to be sold, should be made. It is, therefore, unlike the case where the parties have done what they have stipulated to do; as where the agreement was, the transfer should be without warranty, and such transfer was made, and the title proved defective; the purchaser could not complain that the vendor had not done what he had promised to do. The Court will therefore apply that universal principle of Equity, which forbids one party to take the benefit of a contract, whilst he withholds performance on his part; and will arrest the money until he shall have performed it. The deed must be considered as unexecuted for the purpose of having the effect intended; as an instrument sealed, but not delivered; where individuals under no incapacity to contract are the

parties. For, as the Common Law has declared a delivery necessary to constitute a deed between such parties, the General Assembly has declared a private examination of a married woman necessary to make her deed effectual to pass her lands. 473.

How Equity will Decide in Analogy to the Statute of Limitations.

See Limitations, Statute of. 8, 12.

EVIDENCE.

1. A parish register of marriages, births and deaths, kept pursuant to the act of 1715, is good evidence to prove pedigree, and that the several persons whose pedigree is thus proved, are within the savings of the statute of limitations. 47.
2. In an action to recover the value of a negro slave, the plaintiff gave in evidence a bill of sale for the negro, made to him on the 15th December, 1817. The defendant claimed title to the negro under the same person, and gave in evidence a bill of sale made to him on the 5th of that month. The plaintiff alleged that he had purchased the negro before the 5th, and that it was agreed between him and the vendor, that they should meet on or about the 15th, when he should give bond with security, for the purchase money, and the vendor should make to him a bill of sale. The declaration of the vendor, made between the 5th and 15th, received in evidence to prove these facts. 150.
3. The declarations of a person are evidence against him, and all claiming under him by a subsequent title. He cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his declarations. *Id.*
4. In the case above, the vendor was alive, and amenable to the process of the Court; and it was urged that he himself should be sworn, and his declarations be not received. But he being privy in estate, and in Law, his declarations are those of the party claiming under him. If it be asked, why not swear him? The answer is, the party likes his declarations better. *Id.*
5. A rule prevailed during Lord Mansfield's time, that no man should be heard either directly by himself as a witness, by giving his declarations in evidence to impeach an instrument to which he was a party, or to invalidate a title which he had passed away as a good one. This rule was exploded by Lord Kenyon, and the ancient rule restored, of excluding witnesses only upon two grounds, infamy and interest. It is still retained in some of our sister states, as to instruments which are negotiable. *Id.*
6. Where, upon the trial of a state's warrant for larceny, the justice records the testimony of the prosecutor, the person prosecuted may, in an action for a malicious prosecution, give such parol evidence of this testimony, as is consistent with the written statement, and tends to a more exact specification of the thing stolen. 246.

See Malicious Prosecution.

7. Action on the case by an indorser against an indorsee. Two counts in the declaration: 1. Upon the indorsement. 2. Upon a special agreement entered into between the parties at the time of the indorsement, that the indorsee should sue the maker of the note, and endeavor by legal coercion, to obtain the money from him. and if such endeavors should prove unavailing, that the indorser should be liable. Parol evidence received to prove this special agreement. and upon proof being made thereof, the Plaintiff recovered. 298.

8. Assumpsit for goods sold and delivered. Defendant pleaded a *set-off;* to support his plea, he introduced his book, containing an account against the plaintiff, and was sworn under the book-debt act, (1756, ch. 4,) as a witness to prove the items in the account. The plaintiff then offered a witness to prove that the defendant was a man not worthy of belief when upon oath. Such witness admissible; for the act of 1756, ch. 4, only removes the incompetency of the party who is examined as a witness to prove his account; it leaves his credibility open to be enquired into by a jury. The act uses the words "to make out by his own oath or affirmation," and "to prove," as synonymous. To *prove* a fact, signifies not merely to swear to it, but to establish its truth by a credible witness. Where a statute uses a word, the meaning of which is well ascertained at Common Law, the word shall be understood in the statute in the same sense in which it is understood at Common Law. Where the provision of a statute is general, it is subject to the control and order of the Common Law. If a person is allowed by statute to be a witness, who was admissible at Common Law, he becomes at once affected by all the rules and principles which appertain to that character. If the statute remove one disability, all others remain in full force. 314.

9. Action of debt for £25, the penalty incurred by a colonel of the militia for not making a return to the brigadier-general, as directed by the act of 1806, relative to the militia. The certificate of the adjutant-general is evidence under that act, only of the *delinquency* of the officer; it is not evidence that the person sued was an officer at the time, and bound to make the return. 331.

EXECUTION.

1. Writs of *fieri facias* bearing teste of the same term, and put into the hands of the sheriff at the same time, although issued upon judgments recovered at different terms, have no preference one over the other; the creditors stand in equality of right, and if the property levied upon, do not bring enough to satisfy all the writs, the creditors must be paid in proportion to their respective demands. 43.

2. A judgment creates no lien upon the lands of the debtor, where a *fieri facias* is sued out. The statute of Westminster, 2d, ch. 18, does not in express terms make the lands liable, which the debtor had at the time of the judgment; it is by implication and judicial construction, and by the election made by the plaintiff to sue out the writ given by the statute, that a judgment is a lien upon land. 45.

3. The statute of George 2d, ch. 7, had three objects: 1st, to make lands liable to and chargeable with all just debts. 2dly, to make them assets for the satisfaction of debts in the same manner as real estates by the law of England are liable to debts due by bond or other specialty. 3d, to make them subject to like remedies with personal estates. And the act of 1777, ch. 2, giving the *fieri facias* against "lands and tenements," as well as goods and chattels, is in conformity with this third object of the Statute of George II. *Id.*

4. A judgment is still a lien upon a moiety of the lands, of which the debtor was seized at the time of its rendition, if the creditor sue out an *elegit:* but if he elect to sue out a *scire facias*, the lands are bound only as chattels. *Id.*

5. After judgment at the instance of A, but before suing out execution, the debtor conveys his lands in trust to secure a debt which he owes to B; the conveyance gives to B, a preference,

and his debt must be paid before A. shall have his judgment satisfied out of the land. 46.

6. The suing out of a *fieri facias* after final judgment in case of attachment, is a waiver of the lien created by the levy of the attachment. 67.

7. When goods taken in execution are to be disposed of, the proper mode is to sue out a *venditioni exponas;* and if the goods be not of the value of the debt, the plaintiff may have a *venditioni exponas* for those seized, and a *fieri facias* for the residue, in the same writ. But if the plaintiff, instead of a *venditioni exponas*, sue out a general *fieri facias*, he waives the seizure under the first execution, and destroys the lien which it created. 65.

8. The plaintiff being a constable, levied an execution on the defendant's horse. It was agreed between them, that the defendant should ride the horse home, and the plaintiff would wait for the money. After the defendant took possession of the horse, plaintiff seised him and claimed to hold him under execution. Defendant, by violence, disengaged the horse from the plaintiff, and rode him off, plaintiff brought trover for the horse; and he is entitled to recover, for his agreement with the defendant is a mere voluntary courtesy, not binding on him. The execution remained unsatisfied, and its efficacy not impaired, and justified the plaintiff to re-seize the horse. If therefore, it be conceded, that the first levy of the execution was discharged by the agreement, the second seizure re-vested the property in the plaintiff. 239.

9. In an action against an executor, the jury find that he has fully administered. A *scire facias* issues against the devisees, to shew cause why the plaintiff shall not have judgment of execution against the lands devised. This *sci. fa.* is returned "executed" generally. The devisees plead to the *sci. fa.* and a collateral issue is made up between them and the executor, to-wit, "whether the executor has fully administered," this issue is found in favor of the executor, and the plaintiff has judgment of execution against the lands devised. The execution is levied upon lands in the hands of one of the devisees, who was a minor, and has no guardian, and who appeared and made defence to the *sci. fa.* by attorney, and not by guardian. The lands are sold and purchased by a stranger. His title is good; for whatever irregularity there may be in the judgment, it is the act of a court of competent jurisdiction, unreversed and in force when the sale was made. The execution gave the sheriff authority to sell, and though the judgment were afterwards reversed, or set aside, the title of an intermediate purchaser at the sheriff's sale, shall not be prejudiced. The same principle applies to an error in the execution, the regularity of which cannot be questioned in an action against a purchaser at a sheriff's sale. An execution issuing after a year and a day, is only voidable at the instance of the party, against whom it issues. If the execution be not void, however irregular it may be, the purchaser, being a stranger, will gain a title under the sheriff's sale. 250.

10. An execution issued from February term, 1807, on a judgment recovered in the county court, and was returnable to May term following. The execution was continued, and by virtue of the one which issued from May term, 1808, the same being on the 9th of May, and made returnable to August term following, the land in dispute was levied on and sold, and the lessor of the plaintiff became the purchaser. Judgment was recovered against

the same defendant before a justice of the peace. and the execution which issued thereon was levied by a constable *prior* to the levy made of the first execution by the sheriff. The order of sale was made by the county court at August term, 1809, a *venditioni exponas* was issued, by virtue of which the land was sold, and the defendant became the purchaser. The deed to the lessor of the plaintiff recited, that the sale under which he claimed, was made by virtue of the execution, which issued from February term of the county court, 1807; whereas in truth it was not made until 27th July, 1808. The plaintiff is entitled to recover the lands; for the lien created by the teste of the execution, which issued on the 9th May, 1808, was not destroyed by the levy afterwards made by the constable; particularly as there was no sale under that levy until a levy and sale under the first execution. The erroneous recital in the deed to the lessor of the plaintiff, does not affect the operation of the deed. The recital is not an essential part of the deed; its use is only to explain more fully the intention of the parties, or to serve as a reference in the future investigation of the title. It affirms no fact, and can never amount to an estoppel. The execution gave the sheriff authority to sell, and although his powers be incorrectly set forth in the deed, yet the deed is good. And it would seem that the sheriff may be admitted as a witness to prove the mistake, that he sold under the execution of 1808, and not under that of February, 1807. 260.

11. A constable offered for sale, under an execution, divers goods locked up in a room, without shewing them to the bidders. The sale is void. The law requires the sale to be conducted in such a way as is most likely to make the property bring the highest price. The bidders ought to have an opportunity of inspecting the goods, and forming an estimate of their value. The goods ought also to be present, that the officer may deliver them forthwith to the purchasers. 470.
12. The Sheriff returned on a *fieri facias* that the Bank of Newbern purchased the lands in question. Upon the trial of an ejectment the plaintiff gave in evidence a resolution of the president and directors of the Bank, requesting the Sheriff to make the deed to *him*, and then gave in evidence the deed. *Held*, that this deed is good to pass the title as against the defendant in the execution, notwithstanding the sheriff's return; for the purchaser's title is not dependent upon any special return the sheriff may make on the execution. The law permits one person to bid off property at a sheriff's sale, and then relinquish his bid to another. 507.
13. In ejectment for lands purchased at a sheriff's sale under execution, the plaintiff need shew as against the Defendant in execution, only 1st, a judgment: 2d, an execution, giving to the sheriff authority to sell: and 3d, the sheriff's deed. If, therefore, in the sheriff's deed, there be a mistake in reciting the judgment, or the execution, or the return indorsed on the execution, it is immaterial, if it appear that there was a judgment, and an execution issued thereon, giving to the sheriff authority to sell. 546.

EXECUTORS.

If an executor act with good faith in asking advice of the court of equity, the costs shall be paid out of the estate of his testator. 597.

EVICTION.

Assessment of damages in case of eviction. A. sells to B. three six hundred and forty acre tracts of land, and conveys with special warranty, and covenants that if B. shall lose the land by reason of a better title being in some other person, he will restore the purchase money with interest, and in proportion should he lose any part thereof. Each tract, although containing the same number of acres, is of different value. B. is evicted from one of the tracts by a better title. The rule to be observed in assessing damages in this case is, that 1. the whole of the three tracts are to be valued in gross at the price paid for them by the vendee. 2. The relative value of the tract lost to the value of the whole, is then to be ascertained; and the amount of this relative value with interest thereon, is the amount of compensation to which the vendee is entitled for his loss. 526.

EX POST FACTO LAWS.

See Divorce.

FERRIES.

1. The owner of an old established ferry hath a right of action against him who either keeps in his neighborhood a free ferry, or a ferry at which he receives pay for transporting people, carriages, &c. he not being authorized by the county court to keep such ferry, whereby an injury accrues to the owner of the old established ferry. 57.
2. The ground of this action is not the gain made by the defendant, but the injury sustained by the plaintiff, in consequence of the acts of the defendant; 60.

Therefore,

3. There being two counts in the declaration, one charging that the defendant had, without authority from the county court, erected a free ferry in the neighborhood of the old established ferry of the plaintiff, and by transporting persons, &c. at such ferry, had caused great loss of gain and profit to the plaintiff; the other charging that the defendant had made large gains and profits; the plaintiff, after a general verdict, is entitled to judgment upon either count. 60.

GRANTS.

In determining the priority of grants, issued on the same day, the number marked on each will be regarded and looked to, when there is no other circumstance. The number is no part of the grant; and therefore where two grants issued on the same day, and the one of the lowest number called for the lands covered by the other, this last shall be deemed the prior grant. 539.

GIFTS.

1. Construction of the act of 1806, relative to the gifts of slaves. The act was made to put an end to litigation, perjury, and the difficulty of investigating ancient transactions, of which parol gifts of slaves had been so fruitful. The second proviso of the third section exempts from the operation of the act, the case of a gift from a parent to a child, of slaves which remain in possession of the child at the time of the death of the parent, intestate. In such case, the slave or slaves are to be considered as an advancement to the child, and to be regulated by the laws then in force relating to advancements made to children by a parent in his life-time. Such advancement is a gift or not

at the option of the child: If, after the death of the parent, he elect to bring it into hotchpot, he may do so, and come in for a distributive share; but if he be satisfied with what he has received, he may consider it as a gift, protected by the proviso; and this proviso is not confined to gifts theretofore made, but extends to gifts thereafter to be made. 133.

2. Construction of the act of 1784, ch. 10, relative to gifts of slaves. Alexander, upon the marriage of his daughter with M'Cree, made a parol gift to him of a slave. M'Cree kept the slave in his possession for seven years, and being about to remove out of the State, he made a parol gift of the same slave to his son, an infant of four years old, who, with the slave, remained with Alexander. Two years afterwards, Alexander sold the slave, for a valuable consideration, to Houston, who knew of the gift to M'Cree's son. This sale to Houston is good as against M'Cree's son, under the act of 1784, ch. 10. This act makes *all parol* gifts of slaves void, as to creditors, and purchasers with or without notice. Gifts of slaves, not void as to the creditors of the donor, and purchasers from him, must be in writing, attested and registered, and made *bona fide*. This Court adopts Lord Mansfield's construction of the statute of 27th Elizabeth, and will support voluntary conveyances made *bona fide*, and founded upon a meritorious consideration, against purchasers for a valuable consideration. 429.

3. A father being indebted, but not beyond his ability to pay, made a parol gift of a slave to his son, then two years old. He then paid his debts and sold the slave. The purchaser had express notice of the gift, and declared, before he purchased, that he would not on that account, give the full value. The gift not being in writing, is void as to creditors and purchasers. 466.

4. A father upon the marriage of his daughter in 1805, put into her possession a slave. In 1807, he purchased a tract of land for his son-in-law and family to reside on (the son-in-law having become nearly insolvent), and sold the slave to pay for the land. His daughter complained: he answered that he would build her a house, and let her have another slave. He put into her possession another slave, and she married a second husband, who sold the slave. The purchaser is not entitled to the slave as against the father; for the daughter must be considered either as a donee or a purchaser. If she claimed under a gift, it not being in writing, is void by the act of 1806. She could not claim as a purchaser, because the first slave sold by her father, and by her consent, to pay for the land, was the slave of her first husband. She paid nothing to her father for the second slave. She could not claim upon the ground of a compromise of a doubtful right, for there was no subsisting right in her or her father. In the cases of compromises of doubtful rights, there is a distinct and intelligible right in one of the parties, and the effect of the compromise is to end a dispute which must otherwise terminate in litigation. 483.

5. Previous to the act of 1806, requiring gifts of slaves to be in writing, a mother made a parol gift of a slave to her children, reserving to herself a life estate in the slave. She continued in possession of the slave more than three years after the gift, having in the mean time married; and within three years after her death, the children brought detinue for the slave, against the husband. They are entitled to recover; for, although the reservation of the life estate was inconsistent with the gift; yet, if the possession during life, according to the reservation, was by

the consent of the donees, such possession was not adverse, and the statute of limitations would not bar this claim. The reservation being void, the donees could. at any time after the gift, in the life time of their mother, have made a demand, and upon refusal to deliver the slave, brought suit and recovered. 493.

6. Construction of the 3d section of the act of 1806, relative to gifts of slaves. The words "Every person claiming title to any slave or slaves, by virtue of any parol gift heretofore made, shall commence and prosecute his or her suit for the same, within three years from the passing of this act, otherwise the same shall be forever barred," mean that the *remedy* shall be barred, and not the *right.* 535.

HEIRS.

1. See MILLS.
2. Proceedings under the act of 1784, ch. 11. Liability of the heir upon the obligation of his ancestor. At common law, if the heir was sued upon the obligation of his ancestor, it was necessary for him, in order to prevent a general judgment against himself, to confess the action and shew the certainty of the land which he had by descent. If he pleaded a false plea, or judgment was given against him by default or by confession, or upon any other ground, and he failed to shew the certainty of assets, the Plaintiff was entitled to judgment against him, and execution might issue against his other lands, or his goods, or his body. But under the act of 1784, ch. 11, no judgment can be obtained against the heir, which in any respect can make him personally liable for the debt; the object of the act being to subject the lands of the debtor, which have descended to him. The act of 1789, ch. 39, makes the heir personally liable, where he has sold the lands which have descended to him, before action brought or process sued out against him; and liable, only for the value of the land so sold. Under the act of 1784, ch. 11, the heir may plead to a *scire facias* to subject to sale the lands descended, that the executors or administrators had not fully administered, that the executor or administrator had suffered judgment to be recovered, by fraud, &c. But the plea, "that the lands descended had been sold to satisfy prior judgments," is totally immaterial; and although the Jury find it true, the Plaintiff is entitled to judgment of execution against the lands descended, as if no plea had been pleaded. 579.

HUSBAND AND WIFE, DEEDS MADE BY THEM.
See EQUITY. 7.

INDICTMENT.

1. Indictment against A. for breaking a dwelling-house in the daytime, no person being therein, and feloniously taking therefrom a bank note of the value of five pounds, concludes against the *form of the statute:* A. cannot be convicted of a capital felony. Such indictment should conclude against the form of the *statutes.* For before the statute of 1811, ch. 11, a bank note was not the subject of larceny, and the statute of 1806, ch. 6, which makes capital the offence of breaking a dwelling-house in the day-time, speaks of stealing therefrom *money, goods or chattels.* 3.
2. Every indictment is presumed to be founded on the Common Law, unless some statute be indicated by the drawer of the bill, on which he means to prosecute. 5.

3. If a statute create an offence, or alter the nature of an offence at Common Law, as by turning a misdemeanor into a felony, the indictment must conclude against the form of the statute; and if an offence be made so, not by one statute only, but by two or more taken together, the indictment must conclude against the form of the *statutes*. 6.

4. Under the act of 1811, ch. 6, an indictment for murder may be "intelligible and explicit," and contain sufficient to induce the "Court to proceed to judgment," *if the time and place of making the assault*, be set forth, although they be not repeated as to the *mortal blow*. 7.

5. The Common Law required the circumstances of place and time to be annexed to the very act of striking, by express words, and not by intendment or construction. 8.

6. Indictment under the statute of 1779, ch. 11, charged that A. did "*steal, take and carry away*, a male slave named Amos, of the value of fifty shillings, and the property of one B. *contrary to the Act of the General Assembly in such case made and provided;*" the benefit of clergy is taken away by a conviction on this indictment, although the indictment does not charge that the stealing was with *an intent to sell or dispose of to another, or appropriate to A's use*. 12.

The design of this statute is two-fold: 1st. To punish the crime of stealing a slave with death, by taking away the benefit of clergy, to which the offender was entitled at Common Law. 2d. To punish in the same way all other wrongful means of depriving an owner of his slave, whether by force or fraud, if the act were accompanied with an intention to sell the slave, or to appropriate him to the taker's use. 15.

The words of the statute, "With intent to sell or dispose of to another, or to appropriate to his own use," relate to the taking by violence, seduction, or any other means." 17.

See PERJURY.

7. Indictment charged defendant with "feloniously stealing, taking, and carrying away, a certain bank note, issued by the bank of Newbern." The note offered in evidence upon the trial, purported to be issued by "the president and directors of the bank of Newbern." The defendant was acquitted, because the evidence did not support the charge. He was then indicted "for feloniously stealing, taking, and carrying away, a certain bank note, issued by the president and directors of the bank of Newbern." To this indictment he pleaded, "former acquittal," and to support the plea, produced the record of the first indictment, and the proceedings had thereon. *Held*, that the record produced did not support the plea: and the plea was overruled. 216.

8. Where the defendant in an indictment is acquitted, or a *nolle prosequi* is entered, he is bound to pay his own costs and none other. 223.

9. Indictment charged "that the defendant was a common sabbath breaker and profaner of the Lord's day, commonly called Sunday; and that he, on divers days, being Lord's days, did keep a certain open shop, and then and there sold and exposed to sale divers goods, wares and spirituous liquors, to negroes and others, to the great damage of the good citizens of the State," &c. Judgment arrested; for, charging a man with being a common sabbath breaker and profaner of the Lord's day, is insufficient, as it does not shew *how or in what manner* he was a common sabbath breaker, &c. An indictment is a compound of law and fact, and the Court, upon an inspection of the indictment, must be able to perceive the alleged crime. Charging the defendant

with keeping an open shop, and selling goods and spirituous liquors to negroes and others, on the sabbath, is insufficient; for if the act can be intended to be lawful, it shall be so presumed; and this presumption will continue, unless the act be charged to be done under circumstances which render it criminal, and be so found by a jury. In this case, the defendant might have sold to persons to whom it was a merit rather than a crime to sell; and nothing shall be intended against him. 224.

10. Indictment charged, that defendant was a common, gross, and notorious drunkard, and that he, on divers days and times, got grossly drunk. Judgment arrested; for, private drunkenness is no offence by our municipal laws. It becomes so, by being open and exposed to public view, so as to become a nuisance. It must be so charged, and the jury must so find it, before the Court can render judgment. 229.

See Appeals.

11. Indictment charged the defendant with a perjury, committed on the trial of an issue joined between the State and *six* persons, who are named. The record produced in support of this charge, shewed that on the trial docket, the case stood as one between the state and *six* persons thus named; and in the column appropriated for pleas, the plea of "not guilty" was entered: and on the minute docket where the verdict of the jury was spread out, the case stood as one between the State and *seven* persons. The record produced supports the allegations of the indictment; for the record shews, that an issue was joined betwen the State and six persons named in the indictment, but does not shew that an issue was joined between the State and the seventh person, tried with the other six; and the Court cannot presume it. Where a defendant is tried, and no issue is joined, the Court will award a *venire de novo*, either to the defendant or to the State. 232.

12. Indictment against a woman for murdering her base born child, charged that she, "with force and arms, feloniously, wilfully and of her malice aforethought, did make an assault, and with both her hands about the neck of the child then and there fixed, the said child did feloniously, wilfully and of her malice aforethought, choak and strangle, of which choaking and strangling the said child then and there instantly died." The prisoner being convicted, it was urged as a reason why sentence of death should not be pronounced, that the evidence proved, if the child had been killed by the mother, the manner of the death was different from that charged in the indictment, and was produced by blows, and not by choaking and strangling. Reason overruled; for what the evidence proves is peculiarly the province of the jury to determine. The Court has nothing to do with it; nor can the Court grant a new trial, because the jury have found contrary to evidence. The stat. of 21 Jac. 1, ch. 27, being repealed by our General Assembly, if a Judge, in his charge to the jury, gives to the concealment of the birth of a base born child the weight given to that fact by the statute of Jac. a new trial should be granted. 480.

13. Indictment for a riot "in pulling down, breaking, removing and destroying the dwelling house of one Lucy Showell, she the said Lucy being in the peaceable possession thereof." Upon the trial, it appeared in evidence that Lucy Showell was a feme covert, but her husband did not live with her. The defendants being convicted, the Court awarded a new trial; for, in an indictment for a riot in pulling down a *dwelling house*, as well as in burg-

lary, for breaking and entering a *dwelling house*, the indictment must set forth whose house it is. Here it was the *dwelling house* of the husband, and should have been so charged. If a person inhabit a dwelling house, as the wife, guest, servant, or part of the family of another, it is in law the occupation of such other person, and must be so laid in the indictment. 533.

14. Where a jury returns an informal or insensible verdict, or one that is not responsive to the issues submitted, they may be directed by the Court to reconsider it; but in no other case. Therefore, where upon the trial of an indictment for felony and horse-stealing, the Jury returned for their verdict "that the prisoner was not guilty of the felony and horse-stealing, but guilty of a trespass," and the Court desired them to reconsider their verdict, and say "guilty or not guilty, and no more," and the jury thereupon retired, and returned a verdict of "guilty," generally, this Court ordered the first finding of the jury to be recorded as their verdict, and the prisoner to be discharged. Wherever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded. 571.

INFANTS.

See EXECUTION.

IRREGULARITY OF PROCESS, OR JUDGMENT, HOW IT AFFECTS STRANGERS.

See EXECUTION.

INSOLVENT DEBTORS.

1. A debtor imprisoned on a *ca. sa.* surrenders his estate for the benefit of his creditors, and takes the oath of insolvency, agreeably to the provisions of the act of 1773; ch. 4; whereupon he is discharged; this discharge protects him from arrest at the suit of any other creditor to whom he was indebted at the time. He is thus protected, not by any provision of the act of 1773, but by the 39th section of the Constitution of this State, which declares, that "the person of the debtor, where there is not a strong presumption of fraud, shall not be confined in prison after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors, in such manner as shall be regulated by law." The act of 1778, ch. 5, enforced all such acts of the General Assembly, as were in force and in use before the adoption of the Constitution, which were not inconsistent with that instrument. That act enforced the act of 1773, ch. 4, so far as the same provides for the discharge of insolvent debtors; and so much of the act of 1773, ch. 4, as left the debtor subject to the arrest of a creditor, at whose instance he was not confined previous to his discharge, is annulled by the 39th section of the Constitution. To entitle the debtor to this protection, he must deliver up, *bona fide*, all his real and personal estate, for the use of his creditors. And it would seem not to be material, whether he took the oath of insolvency in the Court in which he filed his petition, or in some other Court, if he gave notice to the creditor at whose instance he is imprisoned. Notice to other creditors is not necessary, although the effect of his discharge, as to them, will be a protection from arrest at their suit. When the debtor delivers up his estate for the use of his creditors, and commissioners are appointed, who give notice to creditors to come in and receive their dividends, each creditor has an election to come in or not. If he come in and

receive his dividend, his debt is satisfied: if he do not, he may sue out execution against such property as the debtor may thereafter acquire. 103.

2. The defendant being arrested upon a *ca. sa.* and in custody of the sheriff, executed to the sheriff a bond, with two sureties thereto, conditioned for his keeping within the rules of the prison, until he should be legally discharged therefrom. Whilst he was thus within the rules of the prison, a *capias ad respondendum* was issued against him, and he was thereon arrested and put into close jail. He thereupon notified the plaintiffs in each case, of his intention to take the oath of insolvency, and the benefit of the act for the relief of insolvent debtors. On the day appointed, he took the oath, and was discharged by the Judge, and went at large out of the limits of the rules of the prison. Motion for judgment against the sureties in the bond for his keeping within the rules of the prison, disallowed; for his going out of the limits of the rules, after he was discharged as an insolvent debtor, was lawful, although he was in *close* jail at the instance of another creditor. The order of liberation extends to discharge him from all imprisonment for debt. The act of 1773, recognizes two kinds of imprisonment, the one *close jail*, the other, the rules of the prison, as directed by the act of 1741. The word "close," used in this act, refers to the personal situation of the applicant, as a pre-requisite for taking the oath; but is omitted in that part which directs his discharge; and pre-supposes there may be others, who hold him in confinement, by directing them to be notified. 270.

INTERNAL DUTIES.

A. obtained a license to distill, under the act of Congress passed 24th July, 1813, imposing a duty on *the capacity* of the still. After the passage of the act of 21st December, 1814, laying a duty of twenty cents per gallon *on spirits distilled*, he failed to give notice to the collector of the internal revenue, of his intention to desist from distilling under his license, after the 1st February, 1815. By reason of this neglect, he became liable to pay the duties laid by both acts. 137.

JURISDICTION.

1. Objections to the jurisdiction of the Superior Courts must, in general, be pleaded; and they can be taken on the general issue, only in cases where the action is in its nature local, as relating to the possession of land, or where a Court has no jurisdiction at Common Law, or where no Court of the State has jurisdiction, or where it has been taken away by statute, without prescribing the manner in which the objection shall be taken, and in cases of the like sort. Therefore, where to a suit under the statute of 1741, ch. 11, to recover the penalty given for excessive usury, the defendant pleaded the general issue, and on the trial moved to nonsuit the plaintiff, because the suit was not brought in the county where the usury was committed, the motion was disallowed. This matter should have been pleaded in abatement under the statute of 1777, ch. 2. 39.
2. Wherever a special power is given to a justice of the peace, by statute, to convict an offender in a summary way, without a trial by jury, he must strictly pursue that power. 121.
3. When a trial by jury is dispensed with, the justice must nevertheless observe the course of the Common Law in trials: he must give notice to the party of the charge against him, and

give him an opportunity of making defence. The evidence against him must be such as the Common Law approves of, unless the statute specially directs otherwise. 122.

See Bastardy.

4. The 20th section of the Constitution provides, "that in every case where any officer, the right of whose appointment is, by this Constitution, vested in the General Assembly, shall *during their recess*, die, or his office, by other means, become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly." The honorable Samuel Lowrie, one of the Judges of the Superior Courts of Law and Courts of Equity, died *during the sitting* of the General Assembly in 1818; and after the adjournment of the General Assemby, the Governor, with the advice of the Council of State, granted a temporary commission to the honorable Blake Baker, to fill the vacancy occasioned by the death of Judge Lowrie. Under this commission, Judge Baker held the Superior Courts of Law and Courts of Equity, in one of the judicial circuits: and a writ being returned before him at the Superior Court of Law for Bladen county, the defendant pleaded to the jurisdiction of the Court, setting forth the above facts, and "prayed judgment if he ought to be compelled to answer to the plaintiff, in his said plea," &c. The plaintiff demurred, and the demurrer was sustained, and the defendant ordered to answer over: for, it is an incongruous proposition, that answer can be required to be given by a man, whether he be a Judge, which answer he cannot give unless he be a Judge. It is true, the extent of the jurisdiction of all Courts, is settled by the Courts themselves; but in all such cases, there is a Court, competent to decide, and it is called upon to decide, not whether it be a Court, but what is the extent of its jurisdiction. The plea contradicts a fundamental maxim, that no man shall be a judge in his own cause. The Law wisely presumes, that no one in such a situation can give a righteous judgment; and if, as the plea assumes, Mr. Baker was incompetent to hold a court, still less was he competent to decide whether he could adjudge in this particular case. 181.

6. The plaintiff was owner of the brig *Jane* and her cargo, both of which were covered by *Spanish* papers to protect them from *British* capture, during the late war between Great-Britain and the United States. On her voyage from a *Spanish* to an *American* port, she was captured by an armed schooner in a belligerent manner, and a prize-master and crew put on board, by whom she was brought into the port of Beaufort, North-Carolina, where she was entered as a Spanish merchantman, having all the papers which it is usual for such a vessel to possess. No commission was shewn by the schooner at the time of capture; but it was known that she had been fitted out from a port of the United States, whence she sailed as a cruiser under a *Carthagenian* commission. Upon the arrival of the Jane at Beaufort, she was consigned by the prize-master to the defendant, who sold part of the cargo, and loaded her with a return cargo. Before she sailed, the American captain appeared and libelled the brig and cargo in the United States District Court of Admiralty. The brig was restored, the return cargo directed to be sold, and its proceeds, after payment of costs, paid to the plaintiff, for damages, for the detention. But as to the prayer in the libel, that damages should be decreed for the value of the cargo on

board at the time of the capture, and that the defendant and others should account for the value in their hands, the libellant waived all further claim on that process, and no decree was made thereon. He then brought an action of trover to recover the value of so much of the cargo as had been sold by the defendant. The action will not lie; for the Courts of Common Law have no jurisdiction in this case, the question of prize or no prize, being one exclusively of Admiralty cognizance; and this question must be decided before it can be ascertained, whether the defendant has committed a wrongful conversion. The jurisdiction of a Common Law Court, administering a code not common to other nations, is ousted, whenever it appears the capture was made in a hostile character; and whenever the jurisdiction of the Admiralty has once attached, by the taking as prize, nothing subsequent can take it away. Whether the State that granted the commission to the cruizer, could rightfully exercise the prerogatives of sovereignty, is a question to be determined by the Laws of Nations, and not by the Municipal Laws of any Country. The view of the case is the same, if the case be considered as one of piracy. The objection that the plaintiff would be without redress, if a Common Law Court refused it, is answered by the decision of the Supreme Court of the United States, "that a prize Court of the United States has cognizance of a capture as prize, where the property is brought within the jurisdiction of such Court; and if the capture were made without a commission, or the vessel illegally fitted out in the neutral country, the captors are bound to make restitution. 279.

LEGACIES.

1. Where legacies are given to three or more persons, as tenants in common, with a bequest to the survivors upon the death of any of them within a given period, the original legacies only, and not the shares which accrued by survivorship, will survive. 23.

The only exception to the rule is, where the fund is left as an aggregate one, and made divisible among many persons as legatees, with benefit of survivorship among them. 26.

See Devises.

2. The rule of considering a legacy as satisfaction of a portion, arises from a presumption that it was so intended by the testator: but that, like all other presumptions, may be repelled or confirmed. 98.

3. If portions be provided by any means whatsoever, and the parent gives a provision by will for a portion, it is a satisfaction *prima facie*, unless there be circumstances to shew it was not so intended. 102.

4. A legacy cannot be claimed *under* a will in express opposition to the plain intention of the testator. But the next of kin can take in express opposition to the words of the will: for they take under the Law, and not under the will. 113.

See Devises. 3.

Contribution between devisees and legatees.

5. Testator bequeathed *ten* negroes to A, *seven* negroes to B, and *seven* to C; after making his will, he sold all his negroes, and died possessed of a large estate. The legatees applied to the Court of Equity to order the executors to lay out so much of the estate as might be necessary to purchase negroes to make good the legacies. The application allowed. 265.

6. Pending the foregoing suit, a compromise was made between the executors and the next friend of the legatees, (who were minors,) relative to the negroes, in which it was agreed that the value of the negroes, as found by the Master, should be paid to the guardian of the legatees. This compromise being satisfactory to the Court, was confirmed. *Id.*

See Devises.

7. Difference between ancient and modern decisions, as to legacies void either by reason of the *uncertainty* of the legatee, or of the *inability* of the legatee to take. Both are founded upon the supposed intention of the testator; but the ancient decisions say, the testator intended to pass only that which was left after taking out the legacies, and that the executor or next of kin take the lapsed legacies; and the modern say, that the testator intended his residuary legatee should take all that does not pass under the will, no matter from what cause there may be a residue. Neither of them, however, say, that a legatee can take without, or contrary to, an intent. Therefore, where a testator bequeathed to his nieces, "the residue of his property not disposed of, except his negro woman Jenny," and in a codicil to his will, directed "that his negro woman Milly be left precisely as his negro woman Jenny was left in his will," and Milly had a child after the death of the testator, this child belongs to the next of kin, and not to the residuary legatees. 597.

LIEN.

See Execution.

The act of Congress of 31 March, 1797, gives to the United States a priority, 1st. Where the debtor has become insolvent: 2d. Where the estate of a deceased debtor in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased: 3d. Where the debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof: 4th. Where the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law. The act of July, 1798, makes the amount of debt due to the United States, a lien upon the real estate of the collector from the time suit shall be instituted for recovering the same; and provides, that for the want of goods and chattels to satisfy the judgment, the land shall be sold; the lien is qualified and contingent, and subjects the lands to be sold, only where the debtor has not personal estate. 498.

LIMITATIONS, STATUTE OF.

1. In an action on the case, to recover damages for a fraud in the sale of a land warrant, the defendant pleaded the statute of limitations; to which plea the plaintiff replied specially, "that the fraud was not discovered until within three years next before the bringing of the suit." Replication overruled and plea sustained; for the cause of action accrued when the fraud was committed, and three years having run from that time before the bringing of the suit, the plaintiff is barred, he not being within any of the savings of the statute. 115.

2. The common saying, "that the statute of limitations does not run where there is a fraud or a trust," is founded in mistake. Where there is a pure trust, in which Equity exercises exclusive jurisdiction, or where there is a fraud, in which Equity exercises the like jurisdiction, the Court of Equity will permit, or not, at its discretion, lapse of time to bar an investigation. That Court is bound by no statute on the subject; for the *subject matter* is not

one of the cases barred by the statute of limitations. It is a pure Equity, not within the letter or spirit of the statute. But if it be a subject matter cognizable at Law, and within the cases provided for in the statute, that statute is as positive a bar in a Court of Equity, as in a Court of Law. The maxim is, not that Equity respects time, but that Equity follows the Law. *Id.*

3. Bill filed by a surviving partner against the executors of the active partner of a firm, for an account and settlement of the partnership transactions. By the articles of the copartnership, the acting partner was to collect whatever debts might be due at the termination of the partnership, and account for the same as he received them, or as often as the other partners might require. The partnership was dissolved on the 4th August, 1774, except as to such matters as necessarily related to the settlement of their accounts, the collection of their debts, and the closing of their affairs. The books and papers were left in the hands of the acting partner, and in April, 1777, he exhibited a balance sheet, shewing, 1st, the sum due to the other partners for stock advanced by them; 2d, the amount of money, securities for money, and property belonging to the firm. In July, 1777, the acting partner made a payment in part to the other partners, for stock advanced by them, and they being British subjects, shortly afterwards were obliged to leave the State, in consequence of the then existing hostilities. The bill was filed in 1800, and the defendants pleaded the statute of limitations, and stated in their plea, that in April, 1777, their testator stated and settled an account with the other partners; which stated account is the balance sheet before mentioned; that the cause of action, if any, accrued to the other partners at that time, and that more than three years had run since that time, &c. Plea overruled with costs: for the acting partner was bound to collect the debts, and settle the business of the firm, and account as often as the other partners should require. The acting partner was a trustee for the others; he received the moneys, and property of the firm, in that character, and he was liable to pay when they should require it; and it was only when they required it and he refused, that his fiduciary character was put an end to, and the statute attached. 139.
4. An adverse possession alone will not take away a right of entry. It shall not have this effect, when under a title which is common to the plaintiff and defendant; the intendment of Law being, in such case, that the defendant's entry was for the benefit of all entitled as co-heirs. 164.
5. Where both parties claim by descent from the same common ancestor, a color of title, by virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case. *Id.*
6. Assumpsit by husband and wife for services rendered by the wife before marriage. Statute of limitations pleaded, and the coverture of the wife replied. The wife had served the defendant for four years, without making any contract in express terms for compensation. The service continued until the marriage, at which time she was more than twenty-one years of age, and no settlement took place between her and the defendant. More than three years expired after the marriage, before the bringing of the suit. The statute bars the action: for in whatever way the hiring be considered, the cause of action accrued to the wife before marriage, and her subsequent coverture could not stop the running of the statute. 167.

7. As the law does not require an express promise for the creation of a duty; but raises the promise wherever there is a sufficient legal consideration, so it will keep that promise alive, where there is an acknowledgment of a sufficient subsisting unsatisfied consideration. As if A. says to B, "I purchased a horse from you twenty years ago, for which I agreed to give one hundred pounds; I have never paid you, and I never will, and I shall rely on the statute of limitations:" this would take the case out of the statutes, contrary to A's express declaration. 221.

8. Where Equity has *concurrent* jurisdiction with the Courts of Law, the statute of limitations is a positive bar in both Courts; for Equity follows the Law, and the rights of the parties shall be the same in both Courts. But where Equity has *exclusive* jurisdiction, Equity will *respect time*, and frequently decides in analogy to the statute of limitations. 273.

See APPEALS. 3.

9. Colour of title, and possession under it. The possession of lands for seven years under colour of title bars the right of entry, although the possessor knew at the time he obtained his colour of title and took possession, that the lands belonged to another person. Any other construction of the act of limitations would render titles insecure, and frustrate the intention of the act. 539.

10. A Sheriff's deed, which recites the execution under which the lands in dispute were sold, as having been tested and signed by the deputy clerk, shall enure as colour of title. For although the Constitution declares, that all writs shall bear teste and be signed by the clerks of the respective courts, yet a writ of execution is not necessarily void because it bears teste and is signed by a deputy clerk; because the act of 1777, ch. 2, sec. 95, provides that in the event of the death of the principal clerk, the deputy shall sue out writs and other process. 562.

11. Whenever the statute of limitations is a bar to the recovery of one of the parties, it operates against the whole, because the disability of one does not save the rights of the others. The statute protects the rights of those who are incompetent to protect themselves; but where some of the parties are competent, they ought to take care of the interests of all, by prosecuting a suit within time. 577.

12. Although the statute of limitations speaks of actions in the Courts of Law, yet it is the duty of a Court of Equity to infuse its spirit into their decisions, as much as can be done without violating its own fundamental maxims; it being the object of both Courts to obey the Legislative will, when expressed either directly or indirectly. The investigation even of a fraud, will not be permitted after a great lapse of time, where the Defendants be not the persons who committed the fraud, although they may be volunteers. The rule, that trust and fraud are not within the statute of limitations, is subject to this modification, that if the trust be constituted by the act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a Court of Equity, or the like, the possession of the trustee becomes adverse, and the statute of limitations will run from the time the fraud is discovered. Wherever the Legislature has limited the period for Law proceedings, Equity will, in analagous cases, consider equitable rights as bound by the same limitation. 583.

13. Act of 1715, ch. 48, barring the claims of creditors. Under the act of 1715, ch. 48, requiring "the creditors of any person deceased to make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred," two circumstances must concur to put the bar in operation, to-wit: the death of the debtor, and the simultaneous existence of a creditor. If, therefore, the creditor die before the debtor, and no administration be taken out on his estate in the life time of the debtor, but is taken out afterwards, and suit is brought within due time, although it be more than seven years after the death of the debtor, the act of 1715 does not bar the claim. When the statute of limitations begins to run, nothing will stop its operation; and, therefore, if a debtor die in the life-time of his creditor, where cause of action has accrued, the act of 1715 will attach upon the claim of the creditor, although no administration be taken out on the debtor's estate for more than seven years. In the report of the case of M'Clellan *v.* Hill's executor, in Conference Reports, 478, the fact of Hill's death before that of M'Clellan is omitted. 594.

MALICIOUS PROSECUTION.

In an action for malicious prosecution, the dismissal of a State's warrant by the magistrate who tried it, is *prima facie* evidence of the want of probable cause; and throws upon the prosecutor the burthen of proving that there was probable cause. 248.

MILLS.

Petition filed under the act of 1809, ch. 15, to recover damages of the owner of a mill, for overflowing the plaintiff's lands. Pending the petition, the defendant dies, and a *scire facias* issues to the heirs, to make them parties. *Scire facias* dismissed; for the act does not direct them to be made parties; and by the Common Law, the heir is in no case liable for the tort of his ancestor. The act of 1805, ch. 8, provides against the abatement of actions brought for an injury done to real property, where the defendant dies; but the revival must be by his representatives. Executors and administrators act in *autre droit*, and maintain the rights of their testators and intestates; but an heir, who enters on the death of his ancestor, becomes seised in his own demesne, and does not claim to hold the land in right of another. 254.

MONEY PAID ON CONTRACTS THAT ARE VOID.

See ASSUMPSIT.

MORTGAGES.

A negro slave being mortgaged in 1784, and the parties living in the same neighborhood all the time, the mortgagor never applied to redeem until 1805. The mortgagee, in answer to the application, said, "he was old and unwilling to have a law suit, and he would deliver up the negro, if the mortgagor would pay the money loaned, with interest, and charge nothing for the hire of the negro." This is a recognition of a then subsisting unsatisfied mortgage, and relieves the Court from considering, whether in this country the time of redemption should be shortened, from the policy of our laws, in quieting claims at law within a shorter period than is required in England. The time is to be computed from the last period at which the parties last treated the transaction as a mortgage; in an action at law, the acknowledgment of the mortgagee in this case, would take the case out of the statute of limitations. For as the law requires not an express promise for the creation of a duty, but raises the promise wherever there is a sufficient legal consideration, so it will keep that promise alive, where there is an acknowledgment of a sufficient subsisting unsatisfied consideration. Nor can it avail the mortgagee any thing, that he declared he would give up the negro, to buy his peace. Things exist independent of their names; if from the nature of the thing, it afford no evidence of the debt or duty, if the sole object of it was to avoid labor or expense, not from a belief of loss in the thing itself, then it can weigh nothing, because it confesses nothing; and if it be taken as the confession or acknowledgment of the party, and taken altogether, there is no debt or duty acknowledged. But if, from the nature of the offer, confession or acknowledgment, the Court perceive in it an acknowledgment of the debt or duty, that weight is to be given to it, which is given to all other evidence, notwithstanding the party, at the time of making it, attempted to give it a name which he thinks will make it weigh nothing. 218.

NOTICE TO PURCHASERS.

1. Possession of title deeds. Where land is sold without warranty, or with warranty only against the feoffor and his heirs, the purchaser is entitled to all the deeds as incident to the land, to enable him to defend it. Where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact shewing an equitable title in another, he will be affected with notice of that fact, and will not be permitted to prove that he did not read the deed, or that he was ignorant of its contents. Where, therefore, the plat and certificate of survey annexed to a grant, shewed that the lands were surveyed for "Ruth and Jane M'Cuistion, orphans of Robt. M'Cuistion" deceased, and the grant to which this plat and certificate were annexed, issued to "Jane M'Cuistion, widow," this is a fact, of which all persons claiming under "Jane M'Cuistion, widow," are bound to take notice. 583.

PERJURY.

1. Indictment for perjury charged, that at a certain Court of Pleas and Quarter Sessions, held for the county of Wayne, on the third Monday of November, 1816, *a certain issue duly joined* in the said Court, between A. and B, in a certain plea of trespass on the case upon promises, in which the said A. was plaintiff, and the said B. was defendant, came on to be tried; and that upon the trial of *said issue so joined*, C. was examined as a witness, and committed the perjury set forth in the indictment. The transcript of the record of this suit, offered in evidence upon the trial of the indictment, did not shew that *any issue had been joined*. The defendant being convicted, a new trial was granted, upon the ground that the transcript of the record did not support the charge in the indictment. 123.
2. In an indictment for perjury, it is necessary to set forth that the oath was taken in some judicial proceeding, before a competent jurisdiction, and upon a point material to the issue depending. And by the Common Law it was necessary to set forth the record of the cause wherein the perjury alleged is charged to have been committed; to prove on the trial that there is such a record, by producing it, or a certified copy thereof; and when produced, it must agree with that set forth in the indictment, without any material variance. *Id.*

3. Since the act of 1791, ch. 7, it is not necessary to set forth the record of the cause, in the indictment; but if it be recited, the recital must be correct, or the prosecution must fail. *Id.*

4. On a conviction for perjury in Rutherford county, two reasons were assigned in arrest of judgment: 1st. That the indictment did not charge that the oath was taken in Rutherford county. 2d. Nor that the evidence was given to the Court, or the Court and Jury, but to the jury only. The first reason overruled, for the indictment charges, "that he, the said A. B, on the 16th April, in the year aforesaid, in the county aforesaid, came before the said C. D, Judge as aforesaid, and then and there, before the said C. D, did take his corporal oath." The part of the indictment immediately preceding, states that C. D. held the Court as Judge, at that term, in Rutherford county; the same county is inserted in the caption of the indictment, and there is none other mentioned in any part of it. The words "then and there" refer to the 16th April and to the county of Rutherford. The second reason overruled; for the indictment charges, that the oath was taken before the Judge, and the evidence was thereupon given to the Jurors. This is the proper way of stating the oath; 1st. Because the evidence given was on an issue to be tried by a Jury. 2d. It is agreeable to the most approved forms of indictments for perjury committed on the trial of an issue. The oath is taken before the Court, but the evidence is given to the jury; and the crime consists in giving false evidence to them in a material point in issue. 153.

5. Indictments charged, that defendant falsely, wittingly, corruptly, &c. swore to certain facts before the Grand Jury upon a bill of indictment; but did not charge how or in what way, the facts thus sworn to, had a bearing upon the allegations of the indictment, nor that they were material to, or connected with, the question then under consideration by the Grand Jury. Judgment arrested. In the absence of positive acts of the Legislature, there is no criterion by which an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is injurious to the State or to an individual, only where it tends to prevent right; therefore, to constitute perjury, it must be to some material fact tending to injure some person. 226.

PARTNERS.

Case for money laid out and expended, &c. The firm of "Carter & Porter" was indebted to the bank of Newbern. Carter was the active partner, and purchased of Fletcher a bond on Everitt, for the amount of which he executed to Fletcher an obligation under seal, in the name of the firm, "Carter & Porter," and Person sealed and delivered the said obligation, as their security. Upon Carter's application, Everitt took up his bond, and gave in lieu thereof, to "Carter & Porter," a note, which was discounted at the bank of Newbern, and the proceeds applied to the discharge of "Carter & Porter's" note due to the bank. Person paid to Fletcher the amount due on the bond which he had executed as security for "Carter & Porter," and brought this action to be in reimbursed. Porter was not present when Carter executed the bond to Fletcher, and a question was made, whether, as this was a bond in which one partner could not bind another, Person had not made Porter his debtor, without Porter's consent, and therefore not entitled to recover of him in this action? There was no evidence that Porter was privy to the contract with Fletcher, or had recognized it as a contract of the firm, except what was furnished by an order drawn by Porter on one Isaac Hill, in favor of Person, in which he directed Hill to let Person have "any amount of notes or judgments to the amount of a note of Carter & Porter, given to Fletcher." Held, that this was evidence of a recognition of a subsisting contract of Carter & Porter, and bound Porter, although he was not present when the bond was executed. One partner cannot bind another partner *by deed*, by virtue of the mere contract of partnership; to do so, he must either have express power under seal, or the other must be present and assent to the act. If this case then stood on the bond alone, although the money arising from the contract was applied to Porter's use, or to the joint use of Porter and Carter, without the assent of Porter, he would not be liable in this action: for no man can make another his debtor without his consent, express or implied. But this assent may be implied from circumstances, and when implied, it has the same effect as the most express assent. Although Carter had no power to sign the bond, so as to bind Porter, yet the bond may be used to shew *in what capacity Carter professed to act.* He professed to act for the firm of Carter & Porter, as their agent. The money raised by the contract was applied to the use of the partnership; Porter recognized the bond as the bond of the firm, and gave directions for its payment. It was Porter's bond only through Carter's agency for the partnership; and his recognition of it as a bond of the firm, cannot be true otherwise than by a recognition of Carter's agency. Porter not only recognizes the bond as the bond of the firm, but takes benefit of the effect of the contract, and assents to the extinguishment of his own debt; and having *knowingly* received the benefit he shall also take the burthen, and do the same thing as if he had personally transacted the business. 321.

PLEAS AND PLEADING.

Action of debt on the statute of usury. Pleas, general issue and statute of limitations. Motion by plaintiff to amend the pleadings by replying to the statute of limitations, "A former suit between the same parties, and a non-suit therein, and that this action was brought within a year and a day thereafter, according to the provisions of the act of 1715." Motion disallowed; for the amendment, if made, would be unavailing. The statute limiting penal actions contains no such saving as the plaintiff wishes to reply, nor a saving of any description; nor is it in *pari materia* with the act of 1715. The nature of this action forbids the amendment. This was no particular man's cause of action until brought; it became his by the suit, and he lost it by the non-suit. It then became common and liable to be brought by any person. If brought by a stranger, it was a new suit, so if brought by the same person. It was not a continuance of his old suit; for it was his no longer than it depended. 237.

PORTIONS.

See LEGACIES.

POSSESSION OF TITLE DEEDS.

See NOTICE TO PURCHASERS.

PROCESSIONING.

A processioner reported to the county court, that he had been called upon by A. to procession his land; that B. had attended; that he began at a corner, and run one line, when B. forbade the processioning. Upon this report, the court appointed five freeholders to go with the processioner, and procession the land. They returned to the court a report of their proceedings, and a motion being made to set their report aside, and quash the order of the county court appointing them, the motion is allowed; because the processioner did not in his report to the county court, set forth the lines in dispute, nor the circumstances on which the dispute was founded, so as to enable the court to decide which party prevailed, whether the lines have been established correctly, and who shall pay costs. It is only by comparing the report of the processioner with that of the freeholders, that the Court can determine which party prevailed in his claim. 504.

PROMISSORY NOTES—BILLS OF EXCHANGE.

A promissory note drawn by A, and indorsed by B, made negotiable at the Newbern branch of the State Bank of North-Carolina, and payble on the 11th December, being not paid at the day, notice of non-payment by the drawer, was not given to the indorser, who lived in the town of Newbern, until the 17th December. This delay in giving notice, discharges the indorser from all liability. 73.

See Evidence. 7.

SCIRE FACIAS.

Scire facias to shew cause, "why execution should not issue for *a fine* on a forfeited recognizance," good; and the plea of *nul tiel record* to such a scire facias is negatived, by producing the record shewing the forfeiture of the recognizance, and the judgment *nisi*. The words of the scire facias, *for a fine*, are mere surplusage. 10.

SHERIFF'S SALES AND DEEDS.

See Execution.

SLANDER.

1. A. charged B. with having stolen a note from him "in the county of Halifax, in Virginia." These words are actionable. It was proved on the trial that the stealing of the note was a larceny by the laws of Virginian, at the time to which charge referred. *It would seem*, that the plaintiff can recover without proof of this fact; for although the crime may have locality, the effect of the imputation will follow a man wherever he goes; and therefore the law gives a remedy for imputations, which, if believed, and even proved, cannot subject the accused to any future prosecution. As where a pardon is granted after the commission of the offence, but before the speaking of the words. The *gravaman* in an action of slander, is social degradation, and not the risk of punishment; and the rule to test the question, whether the words be actionable or not, to-wit, does the charge impute an infamous crime? is resorted to, to ascertain the fact, whether it be a social degradation, and not whether the risk of punishment was incurred. And *this* rule is the test of *that*: for those who are punished for infamous crimes are degraded from their rank as citizens, they lose their privileges as freemen, their *liberam legem*, and are no longer *boni et legales homines*. 463.
2. In a charge of forswearing, unless it appear from the accompanying words, that a judicial forswearing was meant, the Plaintiff must shew upon the record, that the Defendant alluded to some particular forswearing, which amounted to perjury. Therefore,

where the Plaintiff charged in his declaration, that the Defendant said of him, "He swore a lie, and I can prove it," and there was no colloquium set forth of any judicial proceeding, the Plaintiff was nonsuited. 574

SPECIFIC PERFORMANCE.

1. Equity will decree the specific execution of a parol contract for the sale and purchase of lands, although there has been no partial performance, if the contract be proved by such evidence as affords to the mind a conviction no less satisfactory, than that which arises from a contract in writing. 33.

   It is no objection to such a decree, that the purchase money was to be paid *in the fall.* That is a period sufficiently certain. 38.
2. Equity will decree the specific execution of a contract relative to negro slaves, for the same reason that it will decree the specific execution of a contract for the sale of lands, or some favorite personal chattel. 80.

See Arbitrament and Award.

SUPREME COURT.

1. Under the act establishing the Supreme Court, a Judge of that Court cannot award a writ of certiorari in vacation. Application for the writ must be made to the Court. The statement of a case by the presiding Judge, if not certified or referred to in the transcript, as part of the record, cannot be taken notice of by this Court: and this Court, upon a view of the record, must pronounce the same judgment that the Court below ought to have pronounced. 252.
2. This Court will award a writ of certiorari. 507
3. An appeal bond, with a statement of the case made out by the presiding Judge, was filed in this Court, but there was no transcript of the record certified by the clerk under the seal of the Court, in which the appeal had been granted. A diminution of the record being suggested, a *certiorari* was awarded, such a writ being necessary for the exercise of the powers given to this Court. *Id.*
4. A case being sent to this Court upon a particular point, and this Court upon looking into the record discovering that there were other material points arising in the case and connected with its merits, declined deciding the point sent up, and awarded a new trial, that all the circumstances relating to the points discovered by this Court, might be examined in the Court below. In an action of detinue for a slave, brought by a mortgagee against a purchaser from the mortgagor, a single question was submitted to this Court, to-wit, whether the mortgagor's possession of the slave after the mortgage deed was executed, was fraudulent *per se* against subsequent purchasers. The mortgage deed and bill of sale to the Defendant, a purchaser, formed part of the case, and the mortgage deed appeared not to have been registered within fifty days from the time it was made, nor until after the registration of the bill of sale to the Defendant. A new trial was awarded, because the merits of the case were not disclosed by the statement sent up. 569.

TAXES.

The plaintiff occupied a lot in the town of Newbern, as lessee of the trustees of the Newbern Academy, and the defendant being sheriff of Craven county, seized the plaintiff's goods by distress, for a tax alleged to be due upon a part of the lot. The lot was granted for the use of the academy before the revolution. It does not adjoin the lot on which the academy is erected. This lot is not exempted from taxes by the act of 1806, ch. 3, which declares, "that all houses and lots, or other real or personal estate appertaining thereto, set apart and appropriated for divine worship, or for the education of youth, shall be exempted from all taxes." For it was the design of this act to exempt from taxes only that property which was specially and exclusively set apart and appropriated to divine worship and education, and directly employed for either of these purposes; as the lot on which the church or academy stands, and the grounds appurtenant, if employed as a church-yard, minister's residence, or for the recreation or nourishment of youth. 244.

TENDER.

A. Bond was given before the revolutionary war, for a certain sum, proclamation money. During the war, a tender of the debt was made in paper money, but before the paper money depreciated. In 1798 application was made for payment, suit was instituted, and judgment recovered. The defendants at Law filed their bill in Equity, to be relieved from the payment of interest, from the time of the tender to the time application was made for payment, in 1798, and charging in their bill that they knew not where the bond was, until this application for payment was made. Complainants are entitled to be relieved against the interest, from the time of the tender, to the demand for payment: for at the time the tender was made, paper money was a legal tender, and it had not depreciated. A plea of tender can be supported at Law, only by the defendant's bringing into Court the money he admits to be due; and this is required, that the plaintiff may have the immediate benefit of the sum so paid in. 186.

TRESPASS.

An administrator advertised and sold a tract of land; the purchaser entered and sowed wheat, and soon afterwards discovering that he had acquired no title to the land by his purchase, the contract was rescinded, and he quit the possession. The administrator then sold to another man, who placed a tenant on the land. When the wheat was ripe, the first purchaser, who had sowed it, entered and cut the wheat, and the second purchaser hauled it away. Trespass *vi et armis* will lie for this injury; for, by cutting the wheat, the first purchaser became actually possessed of it, and the hauling of the wheat away was a violation of this possession. 496.

TRIAL.

The jury being charged in a criminal case, a motion was made that the witness in support of the prosecution should be sworn, and sent out of the hearing of the court. A similar motion was made as to the defendant's witnesses. The motion being allowed, the witnesses were sworn and sent out. After they were all examined, a motion was made by the Solicitor-General, that he have leave to introduce as a witness, a person who had been in court, and heard the examination of the other witnesses. The motion allowed; for although by the Common Law, the Crown could claim as a matter of right, that the witnesses for the accused be examined in the absence of each other, yet no such right was allowed to the accused, as to the witnesses against him. In this State, no privilege is allowed to the State, which is denied to the accused, and any rule as to the examination of witnesses, must work both ways. The Constitution having declared, that every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony; this right is not forfeited, if, either through inadvertence or design, he omit to call his witnesses when directed to do so. Such also is the rule as to the State. The court can only propose a separation of the witnesses; it cannot compel either party to call in witnesses, until the time comes, when, according to the rules of the court, the party may call on them to be examined. It is true, the right thus secured, must be claimed at the proper time and stage of the trial; and that is, as to the accused, when he is called on to make his defence, and offers his witnesses and proofs. The courts may furnish rules to carry the law into execution, but not to prevent its execution. They cannot, by their rules, exclude a party from a right, when that right is asserted at the time and in the manner contemplated by the law which gives that right. This rule must work for the State as well as the accused. The court will not grant a new trial, because the jury took refreshments after they retired, unless it appear those refreshments were furnished by the party in whose favor they have rendered their verdict. 487.

VENIRE FACIAS.

The court will award a *venire facias de novo*, where the jury in a special verdict, find the evidence and not the facts. 96.

VERDICT.

See INDICTMENT. 14.

WARRANTY IN THE SALE OF PERSONALS.

Warranty in the sale of a horse. When the purchase money was about to be paid, the buyer asked the seller, if the horse was sound: the seller answered, he was. The declaration charged, that the horse was unsound, lame, stiff, and defective in all his limbs. Plaintiff non suited: for the conversation about the soundness, took place after the contract of sale had been entered into. The answer to the question, whether the horse was sound? does not amount to a warranty; for to constitute a warranty, it must be express; it will not be implied by a mere affirmation of the quality or kind of the article sold, nor by a mere affirmation of the value, nor where the subject is of dubious quality, on which common judgment might be deceived: and the reason is, that as a warranty renders the party subject to all losses arising from a failure of it, however innocent he may be, Courts of Law are cautious in creating an obligation of such extent. Without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects: the principle on which the Common Law proceeds, being, that the purchaser ought to apply his attention to those particulars, which may be supposed to be within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. To make an affirmation at the time of the sale, a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment and opinion. 241.

WAGERS.

See ASSUMPSIT.

WASTE.

An action of waste being brought against tenant for life by devise, the tenant pleaded the general issue, and, pending the suit, died. The suit abates. It cannot be revived against the representatives of the tenant, either under the provisions of the act of 1799, ch. 18, or of the act of 1805, ch. 8. The action of waste is not within the words of either of those acts; and it will not be considered within their Equity; because, 1. The action is given by the statue of Gloucester, and that is a highly penal statute. The place wasted is forfeited, and treble damages are given. The action must therefore be considered as in some degree vindictive, especially as against the representatives of the wrongdoer. 2. Those acts aim in all cases to apportion the redress to the wrong done as nearly as possible. 3. Those acts are reciprocal in their operation. They confer on the representatives of *either* party, dying, the *like* right to prosecute or defend suits; and contemplate only those cases wherein the right may be equally and reciprocally exercised. There is nothing in the theory or principles of the actions enumerated in those acts which forbid their being revived for the Plaintiff, or against the Defendant; but the writ of waste is founded upon principles peculiar to itself, and more especially dependent upon a privity between the revisioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the revisioner and the tenant who commits waste, there is no privity, the waste being committed in the life time of the revisioner. 511.

WRITS OF ERROR.

The rule in writs of error, is that all persons against whom a joint judgment is given, must join in it; or, if any of them refuse, he or they must be summoned and severed. 306.

WRITS OF ENQUIRY.

1. In detinue. The Jury find for the plaintiff, and assess damages for the detention of the slaves, but do not find the value of the slaves. The Court will award a writ of enquiry to assess the value, and not order a new trial *in toto*.
2. What matter cannot be supplied by writ of enquiry. If the principal Jury omit to find matter which goes to the very point of the issue, and upon which, if they had found a false verdict, an attaint would lie by the party injured, such matter cannot be supplied by writ of enquiry, because the party thereby injured may lose his writ of attaint, which will not lie upon an inquest of office. The rule is, that where the court *ex officio* ought to enquire of any thing upon which no attaint lies, there the omission of it may be supplied by a writ of enquiry of damages; but in all cases where any point is omitted, whereof attaint lies, it shall not be supplied by writ of enquiry, because on that writ no attaint lies. This rule of the Common Law, as to writs of enquiry, is not enforced here as it is in England. The doctrine of attaint has never been in force here; and therefore the Courts will award writs of enquiry in all cases where convenience and the justice of the case require it. Formerly inquests of office were held by the Sheriff. By the act of 1777, ch. 2, cognizance is taken of them by the court that awards them; and even if the law of attaint were in force, it would be matter of speculation whether it would apply to writs of enquiry executed by courts of record. 523.

ERRATA.

In page 21, for "the part or Mary's share," read "the part *of* Mary's share."

In page 43, for "but if he refuse to sue out a *fieri facias*," read "but if he *elect* to sue out a *fieri facias.*"

In page 64, for "and a seisin in land on the day of such teste," read "and a seisin in *the* land on the day of such teste."

In page 137, for "after the 1st February, 1814," read "after 1st February, 1815."

In page 205, for "either of his or the creditors," read "either of him or the creditors."

In page 251, for "and issue," read "an issue."

In page 274, for "pledged by bill to Goff," read "pledged by Bell to Goff."

In page 318, for "the demise being considered," read "the devise being considered."

In page 332, for "on behalf the plaintiff," read "on behalf of the plaintiff."

In page 429, for "statutes of 27th Elizabeth," read "statute of 27th Elizabeth."

In page 457, for "fully apprised of the donor's claim, be in a better situation than the donor," read "fully apprized of the donee's claim, be in a better situation than the donee."

In page 471, for "verdict for the plaintiff," read "verdict for the defendant."

In page 481, for "that the child was born alive," read "that the child was not born alive."

In page 513, for "the actions which may be survived," read "the actions which may be revived."

In pages 523 and 525, for "whether it would not apply to writs of enquiry executed by courts of record," read "whether *it would* apply to writs of enquiry," &c.

In page 539, for "and there it is a new circumstance," read "and there it is a mere circumstance."

In page 543, for "including of lands," read "including lands."

In page 587, for "James M'Cuistion," read "Jane M'Cuistion."

This book must
not be taken
from the building